

Winter 1-1-2012

Entertainment Law

Jon M. Garon

Follow this and additional works at: http://nsuworks.nova.edu/law_facarticles

Recommended Citation

Jon M. Garon, Entertainment Law, 76 TULANE L. REV. 559 (2002).

This Article is brought to you for free and open access by the Shepard Broad College of Law at NSUWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of NSUWorks. For more information, please contact nsuworks@nova.edu.

TULANE LAW REVIEW

VOLUME 76

FEBRUARY 2002

No. 3

CONTENTS

IN MEMORIAM

REMEMBERING PAT SWEENEY *William A. Lovett* 555

ARTICLES

ENTERTAINMENT LAW *Jon M. Garon* 559

PERSONALITY AND PATRIMONY:
COMPARATIVE PERSPECTIVES
ON THE RIGHT TO ONE'S IMAGE..... *Eric H. Reiter* 673

SHOULD GOVERNMENT BE
ALLOWED TO RECOVER THE
COSTS OF PUBLIC SERVICES
FROM TORTFEASORS?: TORT
SUBSIDIES, THE LIMITS OF
LOSS SPREADING, AND THE
FREE PUBLIC SERVICES DOCTRINE..... *Timothy D. Lytton* 727

COMMENT

THE OVERLAP PRECLUSION TRAP
BETWEEN THE JONES ACT AND
THE LONGSHORE AND HARBOR
WORKERS' COMPENSATION ACT *Victoria L.C. Holstein* 783

RECENT DEVELOPMENTS

DIAMOND SERVICES CORP. v.
BENOIT: THE LOUISIANA SUPREME
COURT LIMITS LIABILITY FOR
THE THIRD-PARTY MAKER OF A
COLLATERAL MORTGAGE NOTE Jason R. Johanson 819

TEXACO EXPLORATION &
PRODUCTION CO. v. AMCLYDE
ENGINEERED PRODUCTS CO.: THE
FEDERAL ARBITRATION ACT
TRUMPS FEDERAL RULE OF
CIVIL PROCEDURE 14(C)..... Ronald L. Oran 833

ARTICLES

Entertainment Law

Jon M. Garon*

This Article focuses on the influence the entertainment industry and its business practices have had on copyright, privacy, and the First Amendment. The Article demonstrates that much of the modern development in the areas of privacy and copyright flow from the practical demands of the entertainment industry, and that the slow accession of free speech rights to traditional entertainment media has served to inhibit the tolerance for certain forms of expressive conduct. At each stage in the recognition and expansion of privacy law, the primary case law stemmed from performers and athletes attempting to control and to market their image. These cases, in turn, supported private individuals from claims of intrusion into seclusion, false light, and governmental intrusions into privacy. The copyright promotion of progress of science and the useful arts has tracked each state of growth in popular entertainment, revising the statute and social norms to promote the entertainment industries as they grow and mature. Finally, in the area of the First Amendment, the narrow but nearly inviolate protection of political speech has been eroded as other forms of speech and communication, primarily those of popular entertainment, have been added to the range of protected activities. As the breadth of free speech has expanded, so has the regulation of that speech. Modern regulation of television, radio, and advertising are not limited to select categories of speech, however, but allow government regulation and restraint of even the most highly prized core political speech. At the same time, free speech concerns have encouraged the voluntary censorship of media, creating a far more pervasive but unregulated tier of censorship. Although generally considered a sideshow in the legal arena, entertainment law has deeply shaped the political, legal, and economic reality that supports the development of the law.

I.	INTRODUCTION	560
II.	PRIVACY AND PUBLICITY	564
	A. <i>Warren and Brandeis, The Right to Privacy</i>	564
	B. <i>Early Court Adoption of Privacy Laws</i>	566
	C. <i>Supreme Court Recognition</i>	578
III.	COPYRIGHT	585
	A. <i>Early History: The English Role in Copyright</i>	585
	B. <i>Early American Copyright Protection</i>	589
	C. <i>The Strains of Musical Protection</i>	597
	D. <i>Birth of a Notion: The Modern Entertainment Era</i>	605

* Professor of Law, Franklin Pierce Law Center. B.A. University of Minnesota (Psychology and Theatre); J.D. Columbia Law School. This Article may be republished without any additional permission for all noncommercial, educational uses upon the condition that the copyright notice and author attribution are included. The materials may be condensed as necessary for such use, but no other alterations are permitted under this authorization. As a courtesy (but not as a condition of republication and distribution) I would appreciate if you inform me of the proposed use and forward me a copy of the final materials as distributed. Additional publications (and those of my colleagues at Franklin Pierce Law Center) may be found at <<http://www.ipmall.fplc.edu/pubs/>>.

E.	<i>The Copyright Road Traveled</i>	611
IV.	CENSORSHIP LAWS AND THE FIRST AMENDMENT.....	619
A.	<i>The Negative Constitution</i>	620
B.	<i>The Many Rights Counted as First</i>	622
1.	"The Right of the People Peaceably to Assemble and to Petition the Government for Redress"	625
2.	"Congress Shall Make No Law . . . Abridging the Freedom of Speech, or of the Press"	626
C.	<i>The Tradition of Censorship</i>	633
D.	<i>The Mutual Distaste for the Motion Picture</i>	635
E.	<i>The Broadening of Speech and the Narrowing of Protection</i>	641
F.	<i>Entertainment's First Amendment—The Ratings Game</i>	647
1.	The Early Years	648
2.	The Hays Office and the Production Code	649
V.	THE MEDIA AND THE MODERN FIRST AMENDMENT	656
A.	<i>The Current Technologies: Cable, Wireless, and Beyond</i>	657
B.	<i>Regulating the Piano Roll</i>	664
C.	<i>Privacy's New Clothes</i>	667
VI.	CONCLUSION: THE NEW ENTERTAINMENT WORLD.....	670

*"The hand that rules the press, the radio, the screen and the far-spread
magazine, rules the country . . ."*

—Learned Hand, Memorial service for Justice Brandeis,
December 21, 1942¹

*"All that I desire to point out is the general principle that Life imitates
Art far more than Art imitates Life . . ."*

—Oscar Wilde, *The Decay of Lying*, 1891²

I. INTRODUCTION

Each semester, hundreds of law students and thousands of would-be artists in dozens of media ask a simple question: "What is entertainment law?" My simple answer has been that it is nothing, it

1. LEARNED HAND, *Mr. Justice Brandeis, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 127, 132 (Irving Dillard ed., 1959).

2. OSCAR WILDE, *The Decay of Lying, in THE WORKS OF OSCAR WILDE* 597, 613 (Walter J. Black, Inc. 1927).

does not exist. Instead, I teach copyright, trademark, privacy, First Amendment, professional responsibility, contracts, business associations, telecommunications, labor, and antitrust law through the lens of the entertainment industries. After ten years of reflection, I have finally changed my mind. Perhaps my answer has been too simple.

The first place to look for entertainment law is in regulations designed specifically to regulate the entertainment industries. While these may make up only a small portion of the entertainment practice, they certainly reflect laws created because of the entertainment industries. The New York Theatrical Syndication Financing Act that regulates the financing of Broadway productions,³ the Jackie Coogan laws that protect child performers from the unscrupulous or wasteful actions of their parents,⁴ talent agency licensing statutes,⁵ film permit ordinances,⁶ and obscenity laws⁷ are all entertainment laws. They share, however, the distinction of protecting society from the evils of the entertainment industry. These statutes reflect what society has said it will and will not tolerate about the entertainment industry. Does this body of financing, production, and distribution limitations embody the true entertainment law? Certainly they color legal tapestry, but something richer embodies the central pattern. Entertainment law has provided more than mere color for significant constitutional, statutory,

3. N.Y. ARTS & CULT. AFF. LAW § 23.01 (McKinney 1998 & Supp. 2001).

4. Thom Hardin, Note, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376, 379-81 (1998); Erica Siegel, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 428 (2000). See generally Shayne J. Heller, Legislative Update, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL-LCA J. ART & ENT. L. 161, 165-72 (1999) (discussing the outdated and modern versions of the Coogan laws).

5. CAL. LAB. CODE §§ 1700-1700.47 (Deering 1999). See generally Donald E. Biederman, *Agents v. Managers Revisited*, 1 VAND. J. ENT. L. & PRAC. 5 (1999) (discussing the regulation of agents); William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493 (2000) (discussing the effect of the Talent Agency Act on personal managers); Edwin F. McPherson, *The Talent Agencies Act: Time for a Change*, 19 HASTINGS COMM. & ENT. L.J. 899 (1997) (same).

6. See, e.g., CAL. MODEL FILM ORDINANCE § II(A); NEWPORT BEACH, CAL. MUN. ORDINANCE ch. 5.46, § 10 (1988); ROBERT G. MAIER, LOCATION SCOUTING AND MANAGEMENT HANDBOOK 156-57 (1994).

7. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 972-74 (1978); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 6-8 (1965); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145 (1989) ("A liberal democracy rests ultimately on the choices of its citizens."); Michael Wingfield Walker, Recent Development, *Artistic Freedom v. Censorship: The Aftermath of the NEA's New Funding Restrictions*, 71 WASH. U. L.Q. 937 (1993).

and common law changes, it has drawn the forms and set the figures in motion.

To suggest that entertainment law exists and has shaped laws of more general applicability, we must come to grips with the troubling truth that mere entertainment has the power to shape our culture and our laws. If entertainment law exists as more than a collection of industry regulations, it does so because entertainment often leads the public debate on fundamental notions of economic and moral justice.

At this point, I must separate those areas in which entertainment products have shaped our popular culture and the legal institutions within it. Shakespeare was said to have been forced to modify his popular character, Falstaff, because of its unflattering resemblance to public figures.⁸ D.W. Griffith's epic *Birth of a Nation* was lauded for its cinematic genius, but was also notorious for reinvigorating segregation wherever it was shown.⁹ The music of the Beatles, Bob Dylan, and the Rolling Stones provided the soundtrack for President Johnson's Great Society and the protest movement against the Vietnam War. Whether the music reflected the times or led the revolution can be debated, but never resolved. Ultimately, such studies are best left to sociologists and social historians than to lawyers.

8. The *Encyclopedia Britannica* states:

Shakespeare had originally called this character Sir John Oldcastle in the first version of *Henry IV, Part 1*, but had changed the name before the play was registered, doubtless because descendants of the historical Oldcastle—who were then prominent at court—protested The historical Sir John Fastolf was a career soldier who in the second phase of the Hundred Years' War had something of a reputation as a coward; however, Shakespeare's presentation of his character was libelous.

Britannica Encyclopedia, *Falstaff, Sir John*, available at <http://www.britannica.com/eb/article?eu=342668&tocrd=0&qieru=sor%20john%20fastdf> (last visited Nov. 5, 2001).

9. The *Film Encyclopedia* describes the film as,

the single most important film in the development of cinema as an art But *The Birth of a Nation* also generated criticism and stirred up a rage of controversy over the Ku Klux Klan and its anti-Negro bias. Some black groups and white liberal groups condemned it as "a flagrant incitement to racial antagonism" and urged authorities in various states to ban its exhibition.

EPHRAIM KATZ, *THE FILM ENCYCLOPEDIA* 510 (G.P. Putnam's Sons 1979); see Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 781 (1992); see also D.W. GRIFFITH, *THE RISE AND FALL OF FREE SPEECH IN AMERICA* (1916) (promoting film as a form of pictorial press so that films like his own *Birth of a Nation* should be entitled to First Amendment protections); MICHAEL PAUL ROGIN, *RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY* 10 (1987) (discussing the movie's connection to the Ku Klux Klan).

Instead, this Article suggests that entertainment law has transformed fundamental legal doctrine. Where laws of general applicability and entertainment intersect, entertainment law has reshaped the jurisprudence. This Article focuses on three areas where the impact has been most profound: privacy, copyright, and free expression. In each of these areas, the interests of the entertainment industry have changed the cultural and legal norms, conforming them to the needs of the industry. Other areas have also been affected. Telecommunications law,¹⁰ contract law,¹¹ and antitrust law¹² also show the impact of entertainment law's influence. This Article, however, will focus on the three areas of law that most closely regulate the communications we make in our daily lives.

If this thesis that entertainment law has reshaped many of the more widely recognized legal doctrines is correct, then the impact of the entertainment industry should be a measurable force governing the development of emerging technological markets. Indeed, the shape and magnitude of the entertainment force may offer a tool for predicting public policy as the traditional entertainment industries converge with the Internet and consumer electronic industries. Once unmasked, this hidden, sequin-gloved hand may be observed as it shapes our future. To understand the potential impact, this review tracks historical development of common law, statutory construction, and constitutional jurisprudence through the three areas of the law selected.

Part II of this Article will review the impact the entertainment industry has had on general laws of privacy, serving as its basis and propelling its growth. Part III will focus on copyright, illustrating the transformation of copyright from its historical origins to its current status as a congressionally adopted form of collective bargaining among the entertainment industry. Part IV reviews the elevation of entertainment from a sinister commodity that required heavy censorship to a vaunted form of expression protected by the near-sacred First Amendment. It details the rise of constitutional protection at the expense of a diluted form of free expression jurisprudence. Finally, Part V will offer some limited assessments on the development of these laws in the context of the rapidly changing entertainment marketplace.

10. *E.g.*, Telecommunications Act of 1996, 47 U.S.C. § 251 (Supp. V 1999).

11. *E.g.*, *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (N.Y. 1917).

12. *E.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518-19 (1917).

II. PRIVACY AND PUBLICITY

A. *Warren and Brandeis, The Right to Privacy*

The law of privacy traces its origins to the groundbreaking law review article *The Right to Privacy* by Louis Brandeis and Samuel Warren.¹³ In the article, they articulated a fundamental "right to be let alone."¹⁴ They reviewed a wide range of litigated cases, developing a comprehensive theory that many cases previously decided were, in fact, based on an implied protection of the plaintiff's privacy. The authors called for the explicit recognition of privacy rights because they were concerned about dropping morality, rampant gossip, and the growth of intrusive technologies such as instantaneous photography and the "newspaper enterprise."¹⁵

Law professors, if they return to the original text of the article (rather than Dean Prosser's updated summary), tend to focus on its discussion of the right to seclusion and the right to have no material about oneself published without permission, subject only to limited common law privilege such as fair comment.¹⁶ Yet, much of the analytical jurisprudence is based not on Roman tort law or libel law, but on common law copyright. As Warren and Brandeis tried to shape the limits of the privacy right, they explain that "[t]he right to privacy ceases upon the publication of the facts by the individual, or with his consent. This is but another application of the rule which has become familiar in the law of literary and artistic property."¹⁷

Warren and Brandeis based much of the now-familiar privacy law on the common law copyright protection that existed in England as

13. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

14. *Id.* at 193.

15. *Id.* at 195-96. Compare the authors' attitude toward burgeoning technology with that of the ancient wrong of gossip:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops

. . . Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Id. (quotations omitted); see Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 752-53 (1996).

16. See Warren & Brandeis, *supra* note 13, at 218-19.

17. *Id.* at 218.

early as the sixteenth century.¹⁸ Under prior copyright regimes in the United States and England, the statutory rights of an author were protected upon publication of the work.¹⁹ Absent publication, the work remained protected by state common law copyright indefinitely and could not be published without the author's consent.²⁰ Warren and Brandeis explained:

In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words, publishes it.²¹

By basing much of the extension of privacy rights to those embodied in common law copyright, Warren and Brandeis extended the property rights of an author in his work to “that which is his,” the author himself.²² In essence, common law copyright is extending a common law right in one's identity when used in another party's expression. Common law copyright applies to publicity rights much more directly than to the protections from intrusion that the remaining privacy doctrines attempt to protect. As such, publicity rights are the smallest extension of existing law, not the most extreme.

The Warren and Brandeis approach sidestepped the more difficult conceptual barriers created when privacy is viewed as an extension of defamation law. First, the article explained in the first paragraph that “the term ‘property’ has grown to comprise every form of possession—intangible, as well as tangible.”²³ In doing so, the article implied the possibility of a regime that would allow for transfers of the property rights, as well as postmortem enforcement. Second, by

18. See *id.* at 195. The authors suggest that English copyright can be first attributed as a “species of private property in England in 1558.” *Id.* at 195 n.1. The Statute of Anne, the predecessor of the modern copyright statute, promulgated in 1710, was held to preempt common law rights upon publication of a work. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1147, at 48 (DaCapo Press 1970) (1891).

19. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.03 (2001).

20. See *id.*

21. Warren & Brandeis, *supra* note 13, at 199-200 (footnote omitted).

22. *Id.*

23. *Id.* at 193.

relying on copyright concepts of publication rather than libel concepts, the approach provided a practical distinction between published and unpublished works, works widely disseminated and therefore potentially harmful because of the general publication, rather than injury caused by the immoral gossip that is best left to religious authorities for recourse.²⁴ Only those works that had received a general publication, i.e., made generally available to the public, would be published for purposes of privacy rights and would be actionable only if published without consent. Private communications and restricted circulation would not result in any invasion of privacy.

This approach also helps explain why the article suggested that oral publication would not be actionable, at least not without special damages.²⁵ Because Warren and Brandeis were contemplating a copyright-like claim, albeit for expression about, rather than merely by, the "author," oral infringements were rare in the nineteenth century.²⁶ Dramatic performing rights, although protected since 1856,²⁷ were essentially limited to dramatizations of the work, rather than the mere public performance of the work.²⁸ The exclusive performing right in music was of even more recent origin, January 6, 1897.²⁹ Perhaps it is too much to read into the authors' reluctance regarding oral infringement, because slander similarly requires special damages while libel often does not. Still, the novelty of public performance rights and the reluctance of the law to afford redress for oral conduct is consistent with the copyright approach applied by the article.

B. Early Court Adoption of Privacy Laws

The Warren and Brandeis article started a debate on the scope and nature of privacy that continues to this day. Over the fifteen years following the Warren and Brandeis article, the high courts of first New York and then Georgia reviewed each state's common law for evidence of this ancient doctrine, newly rediscovered by the two privacy advocates.

24. See *id.* at 218 (applying the copyright definition of publication to state that "the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law" and therefore not subject to privacy liability).

25. See *id.* at 217.

26. See *id.*

27. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138-39.

28. See E.J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT 286 (1902).

29. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481-82.

The Supreme Court of Georgia, the first state to adopt the explicit right of privacy as part of the common law, characterized the Warren and Brandeis article:

It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed.³⁰

New York courts had been dealing directly with privacy and publicity issues at the time of the Warren and Brandeis article. Just prior to the article's publication, the well-known comic opera singer Marion Manola took issue with a proposed show poster, refusing to appear in the poster in a pair of unflattering tights.³¹ The producer procured a photograph without her permission and used it for his advertising of the opera *Castles in the Air*, only to have Ms. Manola successfully enjoin his use of the poster.³² Because Ms. Manola continued to perform in the opera, there was no question regarding deceptive advertising or some other legal theory. She was a star controlling her image to her public.³³ This incident gave strong impetus to the trends identified by Warren and Brandeis and was featured in the article as an example of the trend in the law.³⁴

Two years later, New York was the first state high court to review the privacy laws. The high court was not particularly deferential to Warren and Brandeis or to its lower courts. The case, *Roberson v. Rochester Folding Box Co.*, involved a dispute between the young Abigail M. Roberson and the Franklin Mills Company, which used a likeness of the comely Ms. Roberson on the flour package.³⁵ Approximately 25,000 packages of flour with Ms. Roberson's likeness were manufactured.³⁶ The flour was then distributed, such that "those 25,000 likenesses of the plaintiff thus ornamented have been

30. Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905).

31. See Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 413-15 (1990).

32. See Warren & Brandeis, *supra* note 13, at 195 n.7; see also Glancy, *supra* note 31, at 402-19 (comparing the lawsuits of Marion Manola and Bette Midler to find that the right of publicity is based on the right of privacy); *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; *Miss Manola Seeks an Injunction*, N.Y. TIMES, June 21, 1890, at 2; *Photographed in Tights: Marion Manola Caught on the Stage by a Camera*, N.Y. TIMES, June 15, 1890, at 2.

33. See Glancy, *supra* note 31, at 416.

34. See Warren & Brandeis, *supra* note 13, at 195-96.

35. 64 N.E. 442, 442 (N.Y. 1902).

36. *Id.*

conspicuously posted and displayed in stores, warehouses, saloons, and other public places.³⁷

The facts in *Roberson* are also interesting because the plaintiff alleged an actual and emotional injury as a result of the use of her picture on the flour.³⁸ The Court of Appeals of New York explained, somewhat unsympathetically, that

plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name has been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician.³⁹

Whether the allegation is true is unclear. The case was decided on demurrer, so the court accepted the allegations as facts for the purposes of the opinion.⁴⁰ The allegation may have been true, but it is equally likely that the allegations were framed to overcome any requirement of damages and more closely approximate the case to a form of libel. In fact, the *Roberson* court pointed out that no claim of libel is brought because the picture is a good likeness of Ms. Roberson.⁴¹

Having identified the privacy right as an inchoate right available to protect oneself from unwanted intrusions that give rise to emotional pain, the court quickly dismissed the claim as an unwanted extension of New York common law that would do great mischief to the public and the courts.⁴² The court suggested that no right existed outside the Warren and Brandeis article, and that such a doctrine would open the

37. *Id.*

38. *See id.*

39. *Id.* at 442-43.

40. *Id.* at 442.

41. Chief Justice Parker explained:

Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of \$15,000.

Id. at 443.

42. *See id.*

courts to "the vast field of litigation which would necessarily be opened up should this court hold that privacy exists."⁴³

Perhaps, had the plaintiff asserted her claims as more analogous to property rights than to a right to be free from defamation, the New York Court of Appeals might have been more sympathetic. This is at least suggested, because the court grudgingly mentioned that a publicity right could be created by the legislature:

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute.⁴⁴

The English case law relied upon by Warren and Brandeis, but dismissed by the *Roberson* court, recognized that courts have extended property rights to publicity cases through implied contracts, common law copyright, and trust principles.⁴⁵

Unfortunately, the use of property rights was a double-edged sword. It may be that the historical distinction between law and equity explains some of the difficulty early courts had with the developing privacy and publicity doctrine. In many publicity cases, the measure of damages is speculative. The true relief comes in the form of injunctions, an equitable remedy. But as the Supreme Court had explicitly reminded the country in *In re Sawyer*, "[t]he office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."⁴⁶ The New York Court of Appeals said essentially the same thing: no expansion of the publicity or privacy doctrine without legislative action.⁴⁷

The United States Supreme Court ultimately repudiated this interpretation, but two decades after the *Roberson* decision. The Court finally addressed the need for characterizing intellectual property as property in *International News Service v. Associated Press*.⁴⁸ In that

43. *Id.*

44. *Id.*

45. See *id.* at 444-45 (citing *Prince Albert v. Strange*, 64 Eng. Rep. 293 (V.C. 1849); *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888); *Gee v. Pritchard*, 36 Eng. Rep. 670 (Ch. 1818); *Abernathy v. Hutchinson*, 3 L.J. Ch. 209 (1825); *Mayall v. Highbey*, 158 Eng. Rep. 837 (Ex. Ch. 1862); *Duke of Queensberry v. Shebbeare*, 28 Eng. Rep. 924 (Ch. 1758)).

46. 124 U.S. 200, 210 (1888).

47. See *Roberson*, 64 N.E. at 447.

48. 248 U.S. 215 (1918).

case, the property was the "hot news" of the day. The Court explained its position as follows:

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.⁴⁹

By citing *Sawyer*, the Court seemed to suggest that this was not a change in the relationship between law and equity, but rather a continuation of the equity court's ongoing power. Nonetheless, courts trying to determine the powers over publicity rights were limited by *Sawyer* until the Supreme Court refined its decision. For example, Vassar College found a court unable to exercise equity jurisdiction over the alleged misuse of its name as well as the name of its founder, Matthew Vassar, as a result of the *Sawyer* reasoning.⁵⁰

In his dissent to the *Roberson* decision, Justice Gray endorsed the Warren and Brandeis article, supporting the concept of privacy rights as extensions of natural law, personal liberty, and property rights.⁵¹ He identified the modern camera as "a species of aggression" that might have to be tolerated, but not when used for commercial purposes against the wishes of the subject of the photograph.⁵² By drawing this distinction, he pointed out the implicit line between privacy rights in general and publicity rights, which is the commercial advantage taken by the defendant.

Justice Gray's dissent was endorsed by the next high court to take up the issue of privacy. Four years later, in 1905, the Georgia Supreme Court endorsed the opinion of Justice Gray by finding that privacy

49. *Id.* at 236 (citations omitted)(citing *In re Debs*, 158 U.S. 564, 593 (1895); *In re Sawyer*, 124 U.S. 200, 210 (1888)).

50. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982, 986 (W.D. Mo. 1912).

51. *Roberson*, 64 N.E. at 449 (Gray, J., dissenting).

52. Justice Gray argued:

Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be.

Id. at 450 (Gray, J., dissenting).

rights continued to exist at common law, notwithstanding a long hiatus from the doctrinal literature.⁵³ In the Georgia case, it was again the commercial use of a likeness that was at issue.⁵⁴ In *Pavesich v. New England Life Insurance Co.*, a life insurance company used the photograph of Mr. Pavesich, an artist, to illustrate its newspaper ad.⁵⁵ His picture was used with the caption, "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies."⁵⁶ Pavesich sued for both libel and invasion of his rights of privacy and publicity.⁵⁷

The Georgia Supreme Court had none of the concerns identified by the New York Court of Appeals. Instead, the Georgia court looked to the Roman tradition of protecting privacy as a form of "immutable" personal liberty.⁵⁸ The court viewed the right of privacy as a natural extension of natural law that could not be abolished by time or overlooked because of disuse.⁵⁹ Starting from the perspective of immutable natural rights, it is perhaps surprising that the court was so willing to extend the interests of the plaintiff to the right to control the commercial use or publicity rights in his name and likeness. The court, however, made the extension from privacy to publicity quite easily:

The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it

53. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 78-79 (Ga. 1905).

54. *See id.* at 68-69.

55. *See id.*

56. *Id.* at 69.

57. *See id.*

58. *Id.* at 70.

59. The court explained:

A right of privacy in matters purely private is therefore derived from natural law It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all times and in all places that no authority can either change or abolish them. It is one of those rights referred to by some law writers as "absolute"—such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.

Id. (citations & quotations omitted).

no less embraces the correlative right of privacy, and this is no new idea in Georgia law.⁶⁰

As a result of the Georgia decision, publicity rights were immediately rooted in the fabric of general privacy rights in one state.

More to the point of this analysis, the two seminal high court decisions that framed the debate on the right to privacy stemmed directly from publicity rights. The commercial exploitation essential for the entertainer or athlete is embodied in this right.

The cases continued to develop, and following Justice Gray's dissent and the Georgia court's opinion in *Pavesich*, additional courts continued to find that the commercial rights to privacy ought to be protected. In *Flake v. Greensboro News Co.*, the dispute arose over a commercial for Melts Bakery's rye bread as a cross-promotional advertisement.⁶¹ The ad was supposed to use the photograph of the star from the *Folies de Patee*, a traveling burlesque or vaudeville show, but instead featured Nancy Flake from a publicity photograph of her modeling a bathing suit.⁶²

Despite the lack of a libel claim and a quick apology from the newspaper for the error, the court found a cause of action. The *Flake* Court endorsed the *Pavesich* opinion, recognizing the evolving commercial marketplace.

One of the accepted and popular methods of advertising in the present day is to procure and publish the indorsement of the article being advertised by some well-known person whose name supposedly will lend force to the advertisement. If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action.⁶³

Although the publicity doctrine was developing slowly, it was receiving generally positive judicial reaction.

Similarly, the importance of the publicity right was not lost on New York. In fact, the legislative reaction was rather swift. By 1903, the New York legislature statutorily overturned the *Roberson* decision

60. *Id.*

61. 195 S.E. 55, 58 (N.C. 1938).

62. *See id.* The court could not find a claim for libel, despite the potential ill repute of the *Folies de Patee*, at least in part because Ms. Flake had posed for the bathing suit photograph as a publicity photograph for CBS. *See id.* at 61.

63. *Id.*

of the New York Court of Appeals, adopting instead the position of Justice Gray's dissent.⁶⁴ The statute was simply drafted:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.⁶⁵

Section 51 of the statute extended a private right of action for invasion of this form of privacy.⁶⁶

The New York courts were not keen on being overturned, however, and tended to interpret sections 50 and 51 narrowly. The rights at stake in the initial New York review of the statute were focused on baseball cards and the ability of professional athletes to license their likenesses, but the New York courts did not find a commercially exploitable property right under the statute.⁶⁷ The so-called rights were merely privacy rights, which must not be a form of an assignable property right:

The statutory creation in this state of a limited right of privacy was intended for the protection of the personality of an individual against unlawful invasion. It provided primarily a recovery for injury to the person, not to his property or business True, where an individual's right of privacy has been invaded there are certain other elements which may be taken into consideration in assessing the damages. Thus, where a cause of action under the Civil Rights statute has been established, damages may include recovery for a so-called "property" interest inherent and inextricably interwoven in the individual's personality, but it is the injury to the person not to the property which establishes the cause of action. That is the focal point of the statute.⁶⁸

The New York courts used this interpretation to limit the impact of privacy in general, and the publicity right in particular. The approach of recognizing the privacy right as a personal, nonassignable right was certainly not dictated by either the language of the statute or the economic realities of the transaction.

64. *Id.*

65. 1903 N.Y. Laws, ch. 132, §§ 1-2, (codified as amended at N.Y. CIV. RIGHTS LAW § 50 (McKinney 1998)).

66. *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 2001).

67. *E.g.*, *Bowman Gum, Inc. v. Topps Chewing Gum, Inc.*, 103 F. Supp. 944, 953 (E.D.N.Y. 1952), *rev'd*, *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); *Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553, 560 (N.Y. App. Div. 1951), *aff'd*, 107 N.E. 2d 485 (N.Y. 1952).

68. *Bowman Gum*, 103 F. Supp. at 950 (citations omitted).

New York finally recognized the need to change through the subtle persuasion of the United States Court of Appeals for the Second Circuit. On behalf of the New York courts, the Second Circuit graciously joined the jurisdictions willing to recognize publicity as a distinct, commercial property right. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit assisted New York courts in coming to grips with the growing need for publicity rights.⁶⁹

The Second Circuit ignored New York's baseball card decision of the previous year, instead identifying the need for a distinct right of publicity within the framework of sections 50 and 51 of the New York Civil Rights Act.⁷⁰ The Second Circuit explained that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture."⁷¹ This statement merely reflects the statutory language of the New York Civil Rights Act sections 50 and 51. The court went further, however, by finding that if such a right exists, it is a transferable right that may be sold exclusively.⁷² Although the court chose not to use the term "property right," it found that the publicity right was a transferable interest rather than an inchoate personal right of extension of good will that could only be transferred as part of the sale of a business.⁷³

Most importantly for purposes of this discussion, the Second Circuit explicitly recognized that the purpose of the right embodied in the New York Civil Rights Act was a protection of the marketable value of a performer's name or likeness:

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be

69. 202 F.2d 866, 868 (2d Cir. 1953).

70. *See id.*

71. *Id.*

72. *See id.*

73. "Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." *Id.*

made the subject of an exclusive grant which barred any other advertiser from using their pictures.⁷⁴

For the first time, the authority to market oneself was no longer limited in one of the premiere marketplaces for publicity. Beginning with the *Haelan Laboratories* decision, New York courts reversed half a century of limited enforcement of the Civil Rights Act and began to provide robust publicity protection. The baseball players vindicated the reasoning of Warren and Brandeis.

The litigation trend that emphasized the publicity arm of the privacy rights is not surprising. The reason may stem from the practical implications of litigation. Although privacy rights may indeed be immutable parts of the natural law, there is very little advantage in using the legal process to protect most privacy rights. Legal actions are public events. A person seeking true seclusion is hardly likely to subject herself to the public scrutiny of a lawsuit as a means of enforcing the right not to be subjected to public scrutiny. These social costs create a right for which the remedy is often more objectionable than the injury. Further, in many situations, the damages would be highly speculative. Unless damages are presumed, the plaintiff would have to establish that the invasion into her seclusion resulted in measurable damages. While this may be established through medical expenses and allegations of emotional pain and suffering, such claims were very hard to establish at the turn of the last century.

Instead, the right of publicity brings with it the power both to control the identity and to exploit that identity. The defendant has profited by committing a tort against the plaintiff that may be measured by either the damages to the plaintiff (if they are measurable, such as the plaintiff's ordinary fee to grant permission to use the publicity rights) or the unjust enrichment of the defendant. In other words, if the ad is highly successful, then the plaintiff is entitled to the defendant's windfall.

Without the economic incentive, the Warren and Brandeis article may have had far less impact. The social and transaction costs associated with the defense of privacy eliminate many of the actions. Only in the area of publicity rights do the social costs tend to drop in scope and the transaction costs of litigation bear a reasonable proportion to the potential recovery.

74. *Id.*

It should also be noted that oftentimes invasions of privacy are companions to defamation actions, as it was for Pavesich in Georgia. Extreme situations may result in cases in which the social costs and the transaction costs are insufficient to stop the litigation, either because of the resulting harm caused by the misconduct of the defendant,⁷⁵ an irrational plaintiff who values success in court over all else, or a politically motivated victim.⁷⁶ Still, it is an unlikely coincidence that privacy law was reintroduced to the common law at a time in history when technology was unleashing a new potential for media, commerce, and communications.

In his lengthy exposition decrying the excessive control offered by the right of publicity, Professor Michael Madow provides an excellent historical review of the commercial exploitation of the identities of the famous and notorious.⁷⁷ He identifies a significant shift in the attitudes towards the famous and not-so-famous regarding the use of their photographs on other party's products.⁷⁸ Madow points to an editorial from 1895 to illustrate the change in attitude:

"Any likeness of anything that is in Heaven above" we may expect to see in these days on city walls, slabsided rocks, or country barn doors, as the sign or trade-mark of some quack medicine or shoddy merchandise. If the "likeness" crammed into our vision by a persistent advertiser happens to be his own, we may as well resolve to "suffer and be strong." But when some immortal face that the nation loves is taken by a vulgar smart Aleck and degraded to an advertisement of eye salve, liver pills, or a cure for piles, we ought to be strong enough to make him do the suffering.⁷⁹

While this *Case & Comment* editorial captures the essence of the evolving new law, it is the commercial nature of the use that embodies the fundamental legal change. Professor Madow points out that the legal actions tended to be against the commercial use of the name or likeness rather than the selling of iconographic products, pictures, and souvenirs embodying the famous parties.⁸⁰

75. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392 (1960). Prosser identifies public disclosures of private facts, including a picture of a semiconscious patient, an exhibition of pictures of a cesarean operation, pictures of medical anatomy, a woman's masculine habits and demeanor, and publishing a person's debts. *Id.* at 392-93.

76. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 258 (1964).

77. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 149-51 (1993).

78. See *id.*

79. *Id.* at 152-53 (quoting *Advertising Brigands*, 2 CASE & COMMENT 3 (1895)).

80. *Id.* at 153.

The point is not that privacy law would never have developed but for the *Roberson* and *Pavesich* cases to create economic exemplars. Undoubtedly, as technology made it harder to protect one's "right to be let alone," some form of law would have eventually stepped into the breach. But law develops slowly, and it was *Roberson* and *Pavesich* that led the decades-long transformation.⁸¹ Nonetheless, the importance of the publicity rights is seldom heralded as a central component of the natural laws our capitalist society values. Yet it is just these cases that both led the privacy debate and legitimized those rights.

This is particularly telling in New York. Since the *Roberson* decision, no common law privacy right was ever available. The statutory language was explicitly drafted to address the cases following the misappropriation of name and likeness for commercial advantage. Yet in 1964, the New York Court of Appeals extended the meaning of sections 50 and 51 to embrace a much broader privacy right.⁸² In *Spahn v. Julian Messner, Inc.*, the court had before it the unauthorized and fictionalized biography of Warren Spahn, "one of professional baseball's great left-handed pitchers."⁸³ The court applied sections 50 and 51 to his invasion of privacy for the "commercial exploitation" of the novel, finding that "the defendants' publication of a fictitious biography of the plaintiff constitutes an unauthorized exploitation of his personality for purposes of trade and that it is proscribed by section 51 of the Civil Right Law."⁸⁴ This exceedingly broad definition of exploitation extended the misappropriation doctrine to the furthest reaches of the Warren and Brandeis landscape, blurring the four distinct privacy torts of Dean Prosser into the single, remediable cause of action identified by Warren and Brandeis. The court explained that "[o]ver the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose."⁸⁵ Instead of an

81. See *id.* at 147. Copyright expert Melville Nimmer lamented the slow development of publicity rights, saying that "although the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street in 1890, it may seriously be doubted that the application of this concept satisfactorily meets the needs of Broadway and Hollywood in 1954." Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954).

82. *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, 544-45 (N.Y. 1966).

83. *Id.*

84. *Id.* at 546.

85. *Id.* at 544; see *Flores v. Mosler Safe Co.*, 164 N.E.2d 853, 857 (N.Y. 1959) (holding that a reprint of a newspaper article in an advertisement is actionable by the party named in the newspaper article); *Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 388-89 (N.Y.

illusory general expansion to which the court alludes, this case, based on the need to protect a famous ballplayer's reputation, extended the publicity rights embodied in the statute into a much greater general right of privacy in New York.⁸⁶

Compare once again the language of *Roberson*. The early New York court was primarily afraid (some would say with good reason) of the limits such an unarticulated and unbridled personal right could create.⁸⁷ Unlike a general right to seclusion or the abstract false light theory that broadens defamation to less damaging statements, publicity rights are more narrowly limited.

C. *Supreme Court Recognition*

The courts have not seemed to struggle when faced with the need to balance the scope of the publicity rights against fundamental First Amendment rights, perhaps oversimplifying the issues. The United States Supreme Court first addressed the issue of publicity rights in *Zacchini v. Scripps-Howard Broadcasting Co.*, in which a freelance reporter televised the complete, fifteen second act of Hugo Zacchini, the "human cannonball."⁸⁸ Mr. Zacchini brought an action for damages to his act under both common law copyright and state publicity rights.⁸⁹

Ohio had been recognizing privacy rights since 1956, when it followed *Haelan Laboratories* and other decisions in extending privacy and publicity rights.⁹⁰ As the Ohio Supreme Court explained:

An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.⁹¹

Special Term 1937) (holding that a photograph used in news story is not actionable unless it is used for advertising purposes). Neither of these cases, however, involves anything other than traditional publicity appropriation torts.

86. See Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 590-96 (1998) (collecting modern state laws for the protection of publicity rights).

87. See *Roberson v. Rochester Folding Box Co.*, 64 N.E.2d 442, 443 (N.Y. 1902).

88. 433 U.S. 562, 564 (1977).

89. See *id.* at 564-65.

90. See *Housh v. Peth*, 133 N.E.2d 340, 343-44 (Ohio 1956).

91. *Id.* at 341.

The Ohio Supreme Court recognized Zacchini's publicity rights, but held that any such rights were preempted by the First Amendment.⁹² According to the Ohio court, the freedom of the press to report the news was paramount to Zacchini's interest in his act.⁹³

The United State Supreme Court reversed.⁹⁴ The Court's approach was simple:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.⁹⁵

The Court discounted Ohio's attempt to reconcile broader privacy laws with Supreme Court decisions on the First Amendment like *New York Times Co. v. Sullivan*, *Time, Inc. v. Hill*, and *Gertz v. Robert Welch, Inc.*⁹⁶ These seminal Supreme Court cases extended the First Amendment protections of speech and the press into the state torts of defamation and privacy, at least the false light variety. No longer could a state allow damages for defamatory speech that was merely negligent regarding a public official.⁹⁷ Nor could a plaintiff receive compensation for an invasion of privacy unless the same standards were applied.⁹⁸ As the *Zacchini* Court explained, a plaintiff alleging a nondefamatory falsehood that invaded one's privacy, being held in a false light "could not recover without showing that the [falsehood] was knowingly false or was published with reckless disregard for the truth—the same rigorous standard that had been applied in *New York Times Co. v. Sullivan*."⁹⁹

Despite these Supreme Court decisions, the Court readily distinguished Zacchini's situation. The Court explained that "*Time, Inc. v. Hill*, which was hotly contested and decided by a divided Court,

92. *Zacchini*, 433 U.S. at 565.

93. *Id.*

94. *Id.*

95. *Id.* at 574-75.

96. *See id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

97. *N.Y. Times*, 376 U.S. at 279-80.

98. *Hill*, 385 U.S. at 387-88.

99. 433 U.S. at 571 (citation omitted).

involved an entirely different tort from the 'right of publicity.'"¹⁰⁰ The Court continued:

[T]he State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.¹⁰¹

The *Time, Inc. v. Hill* decision provides a fascinating insight into the transformation of the attitude of the Court towards state privacy rights.¹⁰² Perhaps not coincidentally, this is another entertainment case, in this instance involving the promotion of a new play. The play *The Desperate Hours* by Joseph Hayes was based on his earlier novel.¹⁰³ Both were fictionalizations of a "true crime" event involving the plaintiff, James Hill, and his family, who were held captive by three escaped convicts for nineteen hours before being released unharmed.¹⁰⁴ Neither the novel nor the play attempted to portray the fictional story as that of the Hill family, but Life magazine staged some photographs at the former Hill home, using actors from the New York production.¹⁰⁵

The Hill family did not like art imitating life, and particularly objected to Life getting it wrong.¹⁰⁶ Because the family in the play was portrayed as heroic, libel was inappropriate, so they sued for invasion of privacy, false light.¹⁰⁷ Although the Court ultimately required that the "actual malice standard" of *New York Times Co. v. Sullivan* be extended to the false light cases, the Court was highly fragmented on

100. *Id.*

101. *Id.* at 573 (footnote omitted).

102. The lines of reasoning regarding constitutional privacy are sufficiently distinct that the two strands are not dealt with simultaneously here. It is worth noting, however, that both strands were first championed by Brandeis. As Supreme Court Justice, he authored a famous dissent in *Olmstead v. United States*, in which he wrote that the right of privacy is "the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). His *Olmstead* decision parallels his common law article, declaring that the right to be free from intrusion is that much greater when it involves the state. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (protecting the privacy of the bedroom by barring prosecution for prescribing contraceptives); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (holding the exclusionary doctrine is an essential part of the right of privacy); *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949), *overruled by Mapp*, 367 U.S. at 643 (describing immunity from unreasonable search and seizure in terms of "the right of privacy").

103. *See Hill*, 385 U.S. at 378.

104. *See id.*

105. *See id.* at 377-78.

106. *See id.* at 378.

107. *See id.* at 390-91.

the decision, struggling to reach this position.¹⁰⁸ Most interestingly, none of the five opinions (including two concurrences and two dissents) seriously questioned the right to privacy adopted by the New York courts or the general explanations of privacy law as documented by Dean Prosser.¹⁰⁹ By 1966, the right of privacy that had been first rejected and then narrowly circumscribed, was accepted by the members of the Court even though they could agree on little else. The debate regarding privacy had moved from its existence to the limits of its enforcement when faced with protected First Amendment speech. The theatrical adaptation of Hayes' novel brought the First Amendment question to the forefront and answered all lingering doubts regarding the availability of privacy protection.

In reviewing the *Hill* case, the majority of the Supreme Court relied heavily on *Spahn v. Julian Messner, Inc.*, the New York Court of Appeals case of the previous year that had found protection for Warren Spahn.¹¹⁰ Again, it is an entertainment case that framed the central structure of the New York privacy law.

Spahn, at the time on appeal to the Supreme Court, was vacated and remanded in light of the *Hill* decision. In *Hill*, the Court had been concerned about the impact of the First Amendment on privacy law. As Justice Fortas pointed out in his dissent in *Hill*, "[p]articularly where the right of privacy is invaded by words—by the press or in a book or pamphlet—the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required."¹¹¹

The New York court, however, took little time to reinstate its verdict. Because the book about Spahn was an intentional fictionalization of Spahn's life, there were no First Amendment concerns implicated.¹¹² The protection of truth central to *Sullivan* and *Hill* were not present when the work was knowingly fictionalized.¹¹³ The baseball player was again vindicated. Further, by claiming that the injury was one of misappropriation rather than false light, the court potentially limited the Supreme Court's First Amendment

108. *See id.* at 390.

109. *See id.* at 383 (citing WILLIAM L. PROSSER, LAW OF TORTS 831-32 (3d ed. 1964)). Various justices stated that the total number of jurisdictions recognizing privacy law was either thirty or thirty-five. *See id.* at 383 n.7.

110. *See id.* at 380-87, 396-97 (discussing *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967)).

111. *Id.* at 415 (Fortas, J., dissenting).

112. *Spahn*, 233 N.E.2d at 843.

113. *See id.*

jurisprudence, or at least lessened the entanglement with narrow free speech distinctions.¹¹⁴

In his 1960 article on privacy, Dean Prosser identified only four states as having continued to reject privacy protection.¹¹⁵ Prosser tracked the development of the recently created tort, categorizing them into four discrete classes.¹¹⁶ Even as Prosser acknowledged that Warren and Brandeis "were concerned with the evils of publication," Prosser himself seemed to dismiss the common law property and copyright analysis, describing it as "some property right."¹¹⁷ Prosser also suggested that "[t]here is little indication that Warren and Brandeis intended to direct their article at the fourth branch of the tort, the exploitation of attributes of the plaintiff's identity."¹¹⁸ Apparently, Prosser was not predisposed towards rights of publicity and spent much of his publicity analysis on what uses are not covered rather than on what rights are protected.

Despite Prosser's disdain for publicity rights, he is quick to credit the motion picture industry, or its abuses, for the development of the tort of "public disclosure of private facts."¹¹⁹ According to Prosser, the leading case for this tort was *Melvin v. Reid*, a case involving the motion picture *The Red Kimono* which accurately reflected the true life story of Gabrielle Darley, a prostitute who was tried and acquitted of a sensational murder.¹²⁰ The film used her true maiden name, and the film advertisements included statements that the film depicted the true life of Gabrielle Darley Melvin, so her current identity was also explicitly revealed.¹²¹ The California court could not find a privacy right because the statements were true and part of the legal public record, so they based their denial of demurrer on the California constitution's protection of the right to happiness.¹²²

114. *Cf. Hill*, 385 U.S. at 386-87 (providing strong suggestion that *Spahn* should be overturned). The New York Court of Appeals relied on the intentionally fictionalized aspects of the case to avoid constitutional infirmity. *See Spahn*, 233 N.E.2d at 843. As a hybrid work of fiction, a work will generally meet the actual malice standard. *See id.* at 842-43.

115. Prosser, *supra* note 75, at 388.

116. *Id.* at 389.

117. *Id.* at 384, 389.

118. *Id.* at 401.

119. *Id.* at 392.

120. 297 P. 91, 91 (Cal. Ct. App. 1931).

121. *See id.*

122. The court reasoned:

The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any

Prosser noted that this constitutional basis for privacy has disappeared from California case law, but the legacy was used to control the motion picture and radio industries from publicly intruding on the ghosts of one's past.¹²³ Although writing in 1960, twelve years after motion pictures had been granted First Amendment protection, Prosser did not delve into the First Amendment limitations on the right to protect against the public disclosure of private facts. He stated that "the facts disclosed to the public must be private facts, and not public ones."¹²⁴ He did not give the basis for this limitation, however, and *The Red Kimono* reflects a case in which all the facts were part of the public record.¹²⁵ Possibly, Prosser was anticipating a First Amendment concern without stating it explicitly.

Other forms of privacy rights have also been expanded because of the beachhead established by publicity or entertainment issues. The Supreme Court in *Zacchini* adopted Prosser's distinction between publicity and other privacy rights, but it did not suggest that only publicity rights could be protected.¹²⁶ Instead, in both *Hill* and *Zacchini*, the Court recognized the central rights identified by Warren and Brandeis, as they had been recategorized by Prosser in his 1960 article *Privacy*:

"The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'" Thus, according to Prosser, some courts had recognized a cause of action for "intrusion" upon the plaintiff's seclusion or solitude; public disclosure of "private facts" about the plaintiff's personal life; publicity that places the plaintiff in a "false light" in the public eye; and "appropriation" of the plaintiff's name or likeness for commercial purposes.¹²⁷

Both the majority and dissent in *Zacchini* quoted Prosser and the four types of torts as accurate reflections of the common law of torts.¹²⁸

person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation.

Id. at 93.

123. See Prosser, *supra* note 75, at 393.

124. *Id.* at 394.

125. See *Melvin*, 297 P. at 93.

126. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571 n.7 (1977).

127. *Id.* (citation omitted) (quoting Prosser, *supra* note 75, at 389); see Goodenough, *supra* note 15, at 735 (discussing the adoption of Prosser's formulation as part of the RESTATEMENT OF TORTS).

128. See *Zacchini*, 433 U.S. at 571; *id.* at 581 (Powell, J., dissenting).

By splitting the privacy rights into the inchoate rights of defamation-like privacy torts and property-like publicity torts, the Supreme Court announced that the policies of the First Amendment were readily reconciled with the publicity cases, even though the First Amendment would continue to limit the remainder of privacy law.¹²⁹

In doing so, the Supreme Court completed the progression of publicity rights under the law. The publicity rights, the central property rights of the entertainer, the athlete, and the human cannonball had been elevated to the pinnacle of U.S. law, triumphing over the most vigorously protected tenets of the Bill of Rights. While the Court struggled to contrast publicity rights, freedom of speech and press rights, and copyrights, the Court validated all three. All this within eighty years of a young girl objecting to her picture on a sack of flour.

The entertainer's right recognized by the Supreme Court has transformed both privacy and property laws in its ascension. Given the juxtaposition of publicity rights and the First Amendment, the Beatles may indeed have been correct when they declared "we are bigger than Jesus Christ."¹³⁰ The unbridled First Amendment was reigned in by the lowly Hugo Zacchini, carnival performer.

The sports figure was emboldened with a commodity that transcended his team's identity. Athletes like Tiger Woods¹³¹ and Michael Jordan¹³² have marketed their personality for tens of millions of dollars. Celebrities like Woody Allen,¹³³ Jacqueline Kennedy

129. See *infra* Part IV.

130. On August 4, 1966, John Lennon remarked in a *Rolling Stones* interview that "the Beatles are more popular than Jesus Christ." Beatles records were subsequently banned in several states as well as South Africa. *This Is the Week that Was*, THE (LONDON) INDEP., July 31, 1995, at 22; see also Eve Zibart, *John Lennon 1940-1980*, WASH. POST, Dec. 10, 1980, at D1. Of course, in some jurisdictions publicity rights are now recognized postmortem.

131. Nicholas Stein, *Celebrity, Inc.: How Have So Many Entertainers Muscled onto This Year's List? By Transforming Themselves into Brands*, FORTUNE, Sept. 17, 2001, at 164 (estimating \$54 million for Woods in the year 2000 of which \$10 million was income and the remainder was endorsements).

132. Peter Spiegel, *Jordan & Co.*, FORBES, Dec. 15, 1997, at 180, 181 (estimating \$47 million for Jordan in endorsements in 1997).

133. See *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 368 (S.D.N.Y. 1988) (holding that a cause of action of publicity and trademark infringement for using a look-alike states a claim under the Lanham Act); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 625-26 (S.D.N.Y. 1985) (same).

Onassis,¹³⁴ Johnny Carson,¹³⁵ Elvis Presley,¹³⁶ and many others have benefited from rights first identified by Warren and Brandeis.¹³⁷

While the Court continued, and continues, to struggle with the limits of privacy and its impact on the First Amendment, the decisions in cases such as *Zacchini* and *Hill* served to legitimize the law of privacy itself. Laws unknown less than a century earlier and rejected by state courts at the beginning of the last century had become so pervasive as to be accepted by the Supreme Court almost without challenge.¹³⁸ The entertainers, playwrights, and athletes forged the law into the fabric of society so deeply that this fundamental right has been expanded and never again seriously challenged.

III. COPYRIGHT

An analysis of entertainment law's impact on copyright seems misplaced, and perhaps self-evident. If there is any body of law that is "federal entertainment law," then the Copyright Act embodies that statutory framework. As a statute, it is often shaped through direct negotiation between entertainment media interests struggling amongst themselves for the most equitable and balanced of statutory structures, with consumer and other interest groups barely represented at the table. Nonetheless, copyright was not always perceived as entertainment's law, and this history, although now shrouded in the mists of time, may be enlightening on the changes taking place in the developing law of cyberspace.¹³⁹

A. *Early History: The English Role in Copyright*

As a number of authors, most notably Jane Ginsburg of Columbia University Law School and Paul Goldstein of Stanford Law School, have recently recognized, copyright law does not have the

134. *See Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 263-64 (N.Y. Sup. Ct. 1984), *aff'd without opinion*, 116 A.D.2d 1095 (N.Y. App. Div. 1985).

135. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

136. *See Elvis Presley Enters. v. Capece*, 141 F.3d 188, 207 (5th Cir. 1998) (finding "The Velvet Elvis" was a confusingly similar mark and not entitled to protection as a parody); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1382-83 (D.N.J. 1981) (protecting various Presley trademarks, but allowing live performances to continue).

137. *See Keith E. Lurie, Note, Waits v. Frito-Lay: The Song Remains the Same*, 13 CARDOZO ARTS & ENT. L.J. 187, 187-222 (1994).

138. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 570-72 (1977).

139. Wherever or whatever that law might be.

noble roots that are sometimes ascribed to it.¹⁴⁰ In 1710, the English Statute of Anne established the protection of books and radically altered the monopoly on book publishing in England.¹⁴¹ Under the title "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors of Purchasers of such Copies, during the Times therein mentioned," the English government established protections from copying by unauthorized publishers.¹⁴²

Prior to the Statute of Anne, a monopoly granted by the Crown to the Stationers' Company had served to create a guild monopoly, successfully protecting the publishing monopoly from 1556 to 1694.¹⁴³ The Stationers' Company had originally received protection because early, unregulated markets led to a printing glut and economic ruin for many of the printers in the ensuing shakeout.¹⁴⁴ As Great Britain expanded, the effectiveness of the Stationers' Company monopoly began to wane as the result of trade between England and Scotland. Despite strong demands for renewal of the Stationers' Company monopoly, the House of Lords determined that a balanced property right in the author would better serve the balance of trade than a continued monopoly in the publisher.¹⁴⁵

The Statute of Anne provided far more economic regulation than mere property interests for the author. In addition to copyright, it also provided for a regulated marketplace by allowing a member of the public to object to the monopolistic price set for a book, requiring the Lord Chancellor to intervene and set a fair price.¹⁴⁶ Much like the

140. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBURG TO THE CELESTIAL JUKEBOX* 41-44 (1994); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1874 (1990).

141. An Act for the Encouragement of Learning, 1709, 8 Ann., ch. 19 (Eng.), reprinted in ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT* 2 (5th ed. 1999). Protection of literary works traces its origins back to Roman law and is mentioned in writings by Cicero, Horace and the Roman playwright Terence. RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 8 (1912).

142. GORMAN & GINSBURG, *supra* note 141, at 2-3.

143. EDWARD B. SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 14 (2000).

144. *Id.*

145. STORY, *supra* note 18, § 1147, at 48-49.

146. The statute states:

[I]f upon such Enquiry and Examination it shall be found, that the price of such Book or Books is enhanced, or any wise too High or Unreasonable, then and in such case the [Lord Chancellor or other empowered officials] have hereby full Power and Authority to reform and redress the same, and to limit and settle the Price of every such printed Book and Books, from Time to Time, according to the best of their Judgments, and as to them shall seem just and reasonable. . . .

An Act for the Encouragement of Learning, 1709, 8 Ann., ch. 19, § 4 (Eng.).

compulsory royalty rates of the modern copyright statutes¹⁴⁷ and the judicially determined royalties of the performing rights societies,¹⁴⁸ the Lord Chancellor retained authority to limit the sales price of protected books, to fine booksellers and publishers for charging excessive fees, and to allow for private recovery.¹⁴⁹

The birth of the Stationers' Company came only two years after the birth of William Shakespeare.¹⁵⁰ Shakespeare, who remains credited as the greatest English playwright in history, lived from 1564 to 1616, so his published folios were protected, if at all, under a Stationers' Company contract.¹⁵¹

During Shakespeare's lifetime, the regulation of the theatre also changed significantly. Prior to the reign of Queen Elizabeth, "any gentleman could maintain a troupe of actors."¹⁵² By the same token, however, an actor not in the employ of a nobleman could be sanctioned as a "rogue" or "vagabond"—criminal charges that could result in severe penalties.¹⁵³ Elizabeth modified these regulations to limit which nobles could sponsor theatrical troupes, licensed the content of plays, and by 1574 vested the sole jurisdiction over licensure in the Master of Revels, an office of the Crown.¹⁵⁴ At the same time, she decriminalized the status of being an actor who was not in the employ of a nobleman, and by so doing changed the focus of regulation from the evil of the actors to the forum and substance of the plays themselves.¹⁵⁵

147. See 17 U.S.C. § 115 (2000) (providing compulsory license rates for recorded music).

148. *United States v. ASCAP*, 1950 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (establishing by continuing court order the scope of ASCAP's permissible licensing and the continuing jurisdiction of rate disputes for the performing rights societies); see also *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 11 (1979) (holding that the issuance by ASCAP and BMI of blanket licenses does not constitute price fixing per se that is unlawful under antitrust laws).

149. See GORMAN & GINSBURG, *supra* note 141, at 2. See generally Jon Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS. & ENT. L.J. 491 (1999) (discussing the present-day parallels with monopolization and oligopoly in the media industries).

150. OSCAR G. BROCKETT, *HISTORY OF THE THEATRE* 192 (4th ed. 1982).

151. Typically, the playwright of that era would sell his script to the theatre outright to ensure that other copies of the script were not distributed to competing theatre companies. The theatre, in turn, would enter into a publishing agreement in the rare case in which the plays were uncommonly popular.

152. See BROCKETT, *supra* note 150, at 196.

153. *Id.*

154. See *id.* at 196-97. This situation remained until the Puritan revolution of 1642, during which Charles I was beheaded. All production was banned until the Commonwealth was overturned and Charles II was returned to the throne, marking the start of the Restoration in 1660. *Id.* at 317-20.

155. See *id.* at 197.

Regulation of theatre did not directly track the changes from the Stationers' Company to the Statute of Anne. Some version of the Master of Revels continued in London into the eighteenth century regulating the English stage, controlling the content, and limiting the patents to perform. The [Theatrical] Licensing Act of 1737 vested the licensing authority in the Lord Chamberlain, limited the authorized theatres to the City of Westminster (the official seat of government within greater London), and "prohibited the acting for 'gain, hire, or reward' of any play not previously licensed by the Lord Chamberlain."¹⁵⁶ As a result of the Licensing Act, all theatres in England outside of the two in Westminster were banned from showing plays, and the bulk of theatrical production disappeared until the nineteenth century. While these regulations were slowly relaxed over the next century, they greatly limited live, theatrical entertainment in England.

Beginning in 1710, playwrights could sell the copyright in their plays to publishers.¹⁵⁷ Often, the theatre purchased the copyright to control the publication of the work and discourage unlicensed competition for the play.¹⁵⁸ With the Licensing Act of 1737, most copyright revenue ceased because the smaller theatres outside of London were closed and the marketplace for written plays was eliminated.¹⁵⁹

The Licensing Act and severe limitations on theatrical production meant that the gains of authors under the Statute of Anne did little for the entertainment industry of the era.¹⁶⁰ The age of "rights" heralded by the Statute of Anne extended to map makers and book authors, but not to the dramatists who followed in the shadows of Shakespeare.¹⁶¹ Not until 1833 were the protections afforded to book authors extended to English playwrights.¹⁶²

156. *Id.* at 328.

157. *See id.* at 332.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*; see Ginsburg, *supra* note 140, at 1873.

162. *Ferris v. Frohman*, 223 U.S. 424, 432 (1912). As explained by the Supreme Court:

Performing right was not within the provisions of 8 Anne, c. 19, which gave to authors the sole liberty of printing their books. The act of 1833, known as "Bulwer-Lytton's Act," conferred statutory playwright in perpetuity throughout the British dominions, in the case of dramatic pieces not printed and published; and for a stated term, if printed and published.

Id. (citation omitted).

B. Early American Copyright Protection

From the time of the American Revolution, the founders actively supported the adoption of copyright protection. The United States Constitution gave the federal government authority “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁶³ In 1783, Congress recommended that the states pass copyright legislation which generally “followed the precedent of the English act of 1710 [the Statute of Anne].”¹⁶⁴ Congress then passed the first national copyright act in 1790, entitled An Act for the Encouragement of Learning,¹⁶⁵ which covered books and maps. In so crafting the Copyright Act of 1790, the United States imported not only the economic model for copyright protection from England, but also incorporated its limited scope. Music was not included, nor was the performance on the stage.¹⁶⁶ A playwright, however, could be extended a copyright, but only to stop improper copying of his written script.¹⁶⁷ Also excluded were sculptors, painters, and other visual artists.¹⁶⁸

Over forty years later, in 1831, published music was added to the list of copyrightable works. Nearly thirty years after that, in 1856, Congress added copyright protection for public performances, phrased as follows:

[T]o the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained¹⁶⁹

This statute was enforced for the first time twelve years later, when a New York playwright sued to enjoin the theft of a famous scene

163. U.S. CONST. art. I, § 8, cl. 8.

164. BOWKER, *supra* note 141, at 34-35.

165. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 650 (1943).

166. See Act of May 31, 1790, ch. 15, 1 Stat. 124, 124-26.

167. See *id.*

168. See *id.*

169. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138-39; see *Ferris*, 223 U.S. at 436 (“[T]he performing right or playwright [sic] had no existence at common law separate and apart from the manuscript of the author, but dates its origin from 3 & 4 Wm. IV, c. 15, and in this country from the act of Congress, Aug. 18, 1856, 11 Stat. 138.”); *Daly v. Palmer*, 6 F. Cas. 1132, 1133 (S.D.N.Y. 1868) (No. 3552).

from his play.¹⁷⁰ At stake was the still-famous "Railroad Scene" in which a person is tied to the rail tracks just before an oncoming train threatens to kill the helpless victim.¹⁷¹ The scene, as improperly copied, also included the hero (or heroine in the copy) being imprisoned in a locked room adjacent to the impending accident, so that he (or she) is forced to first break free before being able to free the victim.¹⁷² After explaining that the term for dramatic composition was not defined, but must instead be derived from the Act of 1831, the court readily found that dramatic composition could include staging with or without dialogue.¹⁷³

A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas.¹⁷⁴

The expansive language of the Circuit Court for the Southern District of New York set the new tone for protection of dramatic works, and this language anticipated the silent film era particularly well. By finding that pantomime and stage direction was as much protected authorship as the dialogue, the *Daly* court understood the nature of the developing medium, expansively interpreting a statute that had taken Congress nearly six decades to enact.

The court relied heavily on the musical composition cases that had begun with the Act of 1831, suggesting that the dramatization before the court was not a matter of first impression.¹⁷⁵ The court quoted at length from a leading musical piracy case:

Now, it will be said, that one author may treat the subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite

170. See *Daly*, 6 F. Cas. at 1132. As the *Daly* court explained, "[t]he plaintiff is, by profession, a dramatic author, his business being to compose, write, and produce on the theatrical stage, dramatic compositions, commonly called plays." *Id.*

171. See *id.* at 1133.

172. See *id.* at 1134-35.

173. *Id.* at 1138.

174. *Id.* at 1136.

175. *Id.*

distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and you commit a piracy, if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists Now, it appears to me, that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle.¹⁷⁶

Most remarkable from this opinion is the resonance with which a modern court could adopt this identical passage. The same issues of piracy, line drawing, and substantial similarity remain the essential copyright issues today. The New York court was quite visionary in the nineteenth century. The effect of the decision was itself dramatic, heralding the start of a new economic era for the theatre:

American drama begins with . . . *Daly*. Until *Daly's* time, men of literary eminence could not be persuaded to take an interest in playwriting because of the standards of production, because their work was unprotected by copyright and because the theatre had no interest in any quality beyond the effectiveness of a work on the platform.¹⁷⁷

Music was obviously a highly valuable copyrighted work since those rights were extended in 1831. As is evident from the language of *Daly*, the court relied on this history to provide extensive protection to drama. Still, copyright only protected the author from copying the published music.

176. *Id.* at 1137 (alteration in original) (quoting *D'Almaine v. Boosey*, 160 Eng. Rep. 117, 123 (1835)).

177. SAMUELS, *supra* note 143, at 139 (quotations omitted).

Between 1831, when published music was first granted copyright, and 1891, when the performance of music was added to the exclusive rights of the author, a number of other entertainment forms were addressed by Congress and the courts through the copyright laws. One illustration of Congress's attitude towards the copyright and the arts was Congress's adoption of photography as the first protected visual art. Photography itself was rapidly developed as both an art and a technology in response to the American Civil War. The Civil War invested photography with the dynamic, instantaneous drama that captured the eyes of the nation, propelling it rapidly through its slow maturation. Photographers like Matthew Brady captured the essential images of soldiers in the field as well as portraits of Lincoln and the presidential cabinet.¹⁷⁸ In recognition of this valuable new medium, on March 3, 1865, Congress moved to add "photographs and the negatives thereof . . . upon the same conditions as to the authors of prints and engravings."¹⁷⁹

The language of the statute suggests the mindset of Congress and the attitude of the age. Photographs, like prints and engravings, are illustrations that greatly enhance the "writings of an author." This construction is reinforced by the remaining provisions of the 1865 Act, which extend the deposit requirement to the Library of Congress, and construct the word "book" to include all maps, prints, or other engravings belonging to it.¹⁸⁰ Some commentators have posed at least a rhetorical question as to the reason Congress should jump to protect photographs while failing to include visual arts until 1870,¹⁸¹ but the pattern is clear in every medium. The economic and political goals of copyright policy, like the Stationer's Company, the Licensing Act, and the limitations imposed by the Statute of Anne, all serve to promote the economic production of literary works. This agenda is an explicit part of the statutory regimen, often recognized by the courts.

A comparison to England is instructive. In 1862, three years before Congress moved to protect photography (and admittedly during the height of the Civil War), England adopted a copyright act for works of fine art, extending "copyright to paintings, drawings, and photographs."¹⁸² The term for this copyright protection was life plus

178. *Id.* at 136.

179. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540.

180. *Id.* § 3-4.

181. See SAMUELS, *supra* note 143, at 137.

182. BOWKER, *supra* note 141, at 29 (citing Fine Arts Copyright Act, 1862, 25 & 26 Vict., c. 68 (Eng.)).

seven years.¹⁸³ This was just one of a series of statutes from Great Britain that treated the artist's copyright as separate and more broadly protected than that of the general copyright.¹⁸⁴

The distinction between the artist and the remainder of copyright was never adopted in the United States. Instead, as the Supreme Court explained in a twentieth-century dispute: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"¹⁸⁵

The explanation of the purpose underlying copyright, an economic rationale that provides protection to the author or artist as a necessary step in an economic transaction, may be entirely appropriate. That debate is beyond the scope of this Article. The pattern does set forth, in fairly stark terms, however, why photographs used to promote government propaganda during and following the Civil War would receive immediate copyright protection as a tool for promoting or "advancing public welfare" while protecting oil paintings and statuary would not rise to that level. The statues and paintings may have an aesthetic value, but the economic value would only come along later.

Typically, the aesthetic value became recognized when the industry was sufficiently robust that economic value became present. As a result, both Congress and the courts have inexorably expanded the reach of copyright without having to make any significant changes to the traditional notion of the corporate, business value of copyright.

For fine art, Congress first moved in this direction with the 1870 Copyright Act that extended copyright to "a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts."¹⁸⁶ The fine arts amendment to the copyright laws paralleled the scope of works that had been protected in England since 1862, but the term was not the generous life plus seven

183. *Id.* at 30.

184. *Id.* at 240.

185. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see 1 NIMMER & NIMMER, *supra* note 19, § 1.03. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (examining the moral and economic rationale for copyright in books); Barry W. Tyerman, Comment, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971) (answering Breyer's article and arguing that existing copyright law is both intellectually and financially profitable).

186. Copyright Act of July 8, 1870, ch. 230, § 86, 16 Stat. 193, 212.

years. Instead the term of copyright remained the same twenty-eight-year term, with a renewal term of fourteen additional years.¹⁸⁷

The fine arts distinction was challenged in *Bleistein v. Donaldson Lithographing Co.*, which involved a circus poster announcing "The Great Wallace Shows—Colossal 3 Ring Circus, 2 Elevated Stages."¹⁸⁸ The district and circuit courts found that the poster, as a mere advertisement (and an advertisement for a circus!), was not worthy of the fine art protection afforded by the statute.¹⁸⁹ Despite the rulings of the lower courts, Justice Holmes, writing for the majority, dismissed such arguments with strident language.

First, he established that the work does not need the court to determine its value, explaining:

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs.¹⁹⁰

In this dismissive introductory comment, he eliminated the congressional construction that had valued and protected prints for nearly a century longer than it had offered that same protection to paintings. The sentence is undoubtedly correct, and any alternative construction of the statute unbearably strained. Nonetheless, the statement is striking. Either society had come so far that the distinctions once made were now incomprehensible historical oddities, or the Court was unwilling to accept the legacy that Congress and the lower courts had created.

The dissent took a different, more historically accurate approach. Restating the decision of the Sixth Circuit, the dissent stated the question in economic terms first:

That if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the

187. *Id.* §§ 87-88.

188. 188 U.S. 239 (1903). For a reproduction of the poster in question, see SAMUELS, *supra* note 143, at 141.

189. The decision of United States District Court for the District of Kentucky was affirmed by the United States Court of Appeals for the Sixth Circuit. *Bleistein*, 188 U.S. at 241. The Court had already found that a staged portrait (in this case, of Oscar Wilde) had sufficient authorship to be protected by copyright, notwithstanding the significantly mechanical process of photography. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

190. *Bleistein*, 188 U.S. at 249.

meaning of the constitutional provision, to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible.¹⁹¹

This approach by the dissent has some economic merit. Advertising needs no external incentive to be created, because the incentive to advertise comes from the reward of sales of the advertised product or service. As such, protecting the copyright in advertising increases the costs to the public without any concomitant benefit to the public. The advertising will be created whether the public wants it or not. Indeed, most advertising is designed to get the public's attention despite objection, hardly an endeavor needful of a statutory monopoly.¹⁹²

Holmes did not address this economic issue. Whether or not it had legitimate merit, it was not the real basis of the objection by the dissent at the Supreme Court. Instead, the dissent had greater concerns:

[The work] must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show

The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.¹⁹³

Holmes did address the reach of the 1870 and 1874 provisions on paintings, drawings, and sculpture. He explained, however, that even a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

191. *Id.* at 252 (Harlan, J., dissenting).

192. *Cf.* Trade-mark Cases, 100 U.S. 82 (1879) (holding that the Copyright and Patent Clause could not be used to provide the basis of federal trademark law). A proper economic argument would still protect advertisements because the investment in their quality would depend on the ability to protect their exclusive use. If any ad created for a product could be copied by a competitor by merely deleting references to the particular brand, the investment in the advertising would drop considerably, with a concomitant loss of information and quality for the public.

193. *Bleistein*, 188 U.S. at 253 (Harlan, J., dissenting).

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.¹⁹⁴

The Court dismissed the statutory constructions of both the lower court and the dissent, which required the works be deemed fine art to be protected.¹⁹⁵

Holmes focused the bulk of his reasoning not on copyright at all, nor on the niceties of economic incentives. Instead, Holmes began to lay the groundwork for his significant decisions in the area of First Amendment doctrine and the importance of the "marketplace of ideas."¹⁹⁶ Over fifteen years earlier, and interpreting a different provision of the Constitution, Holmes nonetheless looked to fundamental principles, changing the focus of the opinion from the rights of the parties to the role of the courts:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.¹⁹⁷

194. *Id.* at 250.

195. *See id.* at 250-51.

196. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes, joined by Justice Brandeis explained:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Id.

197. *Bleistein*, 188 U.S. at 251-52.

The underlying phrases between the marketplace of political ideas and crass entertainment are not lost on Holmes. To paraphrase both opinions, *if an idea, advertisement, or opinion commands the interest of any public, it has a commercial value and the power of the thought to get itself accepted. The best test is in the competition of the market, and that truth is the only ground upon which any judgment can be made.*¹⁹⁸ It would stretch the point of this Article to suggest that a circus act is responsible for Holmes's development of the "marketplace of ideas" metaphor, one of the most compelling intellectual images in constitutional jurisprudence, but some minimal credit can be given for the seeds first sown. Certainly, an alternative reading of *Bleistein* is not that Holmes advocated a minimal level of creativity, but that the value of the limited monopoly extended by copyright should be defined by the marketplace rather than the courts.

C. *The Strains of Musical Protection*

The technological changes lamented by Warren and Brandeis as invasions of privacy were also changing the world of public entertainment through music. Mechanical devices and musical boxes that had started as works of beauty were transforming into machines that recreated music.¹⁹⁹ By 1876, the music box was overtaken by the player piano, which received its grand public display at the Philadelphia Centennial Exposition.²⁰⁰ The next year, Thomas Edison invented the phonograph.²⁰¹ The player piano used air to pump the action of a specially equipped piano. Because the quality of sound was based primarily on the quality of the piano, the sound quality of piano rolls could be amazingly close to live performance. Well into the twentieth century, the player piano was the respected musical player in the home.

Within a decade of these technological marvels, Congress moved to amend the copyright laws once again. The performance rights for

198. Compare *id.* at 251-52, with *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

199. *Kohn on Music Licensing* explains:

Originally placed in snuff boxes, watches, and various ornamental objects and commonly used today in jewel boxes, figurines, and children's toys, the music box was invented in 1796 by Antoine Favre, a Swiss watchmaker. In the 1820s, as they became popular in homes, music boxes were mass produced to fulfill demand. By the mid-19th century, several developments in the technology lead to music boxes that could play a wider selection of music for a longer period of time.

AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 653 (2d ed. 1996).

200. SAMUELS, *supra* note 143, at 33.

201. See KOHN & KOHN, *supra* note 199, at 654.

music were finally extended to composers and songwriters in 1897.²⁰² As discussed in greater detail below, those same performance rights were then limited by Congress in 1909.²⁰³

While the homeowner and restaurateur understood the player piano and its almost-live action, the early courts did not. In 1888, the United States Circuit Court for the District of Massachusetts reviewed the copyright protection for the song *Cradle's Empty, Baby's Gone*.²⁰⁴ The court explained the problem simply:

The sole question in issue is whether these perforated sheets of paper are an infringement of copyrighted sheet music. To the ordinary mind it is certainly a difficult thing to consider these strips of paper as sheet music. There is no clef, or bars, or lines, or spaces, or other marks which are found in common printed music, but only plain strips of paper with rows of holes or perforations.²⁰⁵

Having thus framed the issue, the court took only two more paragraphs to find that the plain strips of perforated paper could not infringe the copyrighted music of the songwriter.²⁰⁶

Without the burden of copyright, piano roll manufacturers were quite successful. According to the Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.*, in 1902 "from seventy to seventy-five thousand of such instruments were in use in the United States, and that from one million to one million and a half of such perforated musical rolls . . . were made in this country in that year."²⁰⁷ Still, the rights conferred by copyright were limited by statute and narrowly construed. As such, the cases in both England and the United States universally found that the piano rolls did not constitute a copying of the copyrighted song.²⁰⁸ These dramatic changes to the technology and the explosion of entertainment business led to a call for significant reform in copyright laws. In 1905, the President asked Congress to revise the copyright act in keeping with the technological change.²⁰⁹

202. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481-82.

203. 17 U.S.C. § 1(e) (1909) (superseded).

204. *Kennedy v. McTammany*, 33 F. 584, 584 (D. Mass. 1888).

205. *Id.* at 584.

206. See *id.* at 584-85.

207. 209 U.S. 1, 9 (1908).

208. See KOHN & KOHN, *supra* note 199, at 656; see also *White-Smith Music Publ'g*, 209 U.S. at 1 (holding that piano rolls were not copying of musical composition, but merely part of mechanism for reproducing sound).

209. See *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 477-78 (E.D. S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924) (discussing the two different bills that were debated regarding the 1909 Copyright Act).

Hearings were held in both 1906 and 1908.²¹⁰ The statute was fundamentally altered, but the approach continued to inch forward slowly.

The copyright gloss on piano rolls and phonograph recordings created in *White-Smith Music Publishing* continued to pervade the new 1909 Copyright Act. The Act overcame the judicial objections to the perforated blank paper, and, by implication, the even more obtuse wax-covered cardboard cylinders being used for Edison's phonographs.²¹¹ The new Act extended copyright protection to musical works embodied in "any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."²¹² The congressional leap over the courts to machine-readable works under copyright, however, was not unfettered.

Congress wished to grant copyright holders the exclusive right to record their work on piano rolls or phonograph records, but feared that the large musical publishers would then be able to dominate the marketplace for popular music.²¹³ As a compromise, the exclusive right to record the musical composition was initially vested in the copyright holder.²¹⁴ Once exercised, however, that right could also be exercised by any other recording company willing to pay a fee set by Congress.²¹⁵ This mandatory permission became the first compulsory license under the Copyright Act.²¹⁶ The initial statutory charge was "two cents on each part manufactured."²¹⁷ Congress, like its predecessors drafting the Statute of Anne, feared that an exclusive right to control the use of this popular medium could lead to abuse and monopoly. In fact, one such company was already in the marketplace. The Aeolian Company had anticipated the 1909 Copyright Act by purchasing many of the copyright interests in piano rolls, garnering a significant portion of the market.

One of the issues that remained unanswered was whether a recording company could copy the recordings of its competitors or whether it had to manufacture a master recording independently using

210. *See id.*

211. KOHN & KOHN, *supra* note 199, at 654.

212. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1075-88.

213. *See* KOHN & KOHN, *supra* note 199, at 656.

214. *See id.*

215. *See id.*

216. *See id.* at 657.

217. *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1075-88; KOHN & KOHN, *supra* note 199, at 656-57.

its own artists.²¹⁸ Shortly after the compulsory mechanical license went into effect in 1912, the first case on this matter was decided. Aeolian, the largest owner of piano roll rights, quickly sued to protect its holdings. The result is surprising from a copyright perspective, but predictable for its business application. In *Aeolian Co. v. Royal Music Roll Co.*, a New York district court found that the mechanical license granted by Congress extended only to the copyrighted work embodied in the piano roll.²¹⁹ The license did not extend to the manner in which the work was manufactured.²²⁰ As such, the physical copying of the roll was not permitted under the statute, and the court issued a temporary injunction.²²¹

The court explained that "any party aggrieved may file a bill in equity and a [District] Court of the United States may grant an injunction to prevent and restrain the violation of any rights secured by such act."²²² The court based its analysis on the theory that

the subsequent user [of the copyright] does not thereby secure the right to copy the perforated rolls or records. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll.²²³

The court's argument is compelling and commonly used. The only problem stems from the lack of a statutory (or constitutional²²⁴) basis. According to Congress and the Supreme Court, the piano roll is a mechanical copy, not a work protected by copyright.²²⁵ As such, there are no property rights in the piano roll that are subject to copyright protection. Nonetheless, the case is consistent with the approach of Congress and the courts to enforce the recognized economic rights at stake in the entertainment business.²²⁶

218. See *Edward B. Marks Music Corp. v. Colo. Magnetics, Inc.*, 497 F.2d 285, 287 (10th Cir. 1974); *Duchess Music Corp. v. Stern*, 458 F.2d 1305, 1310 (9th Cir. 1972); *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926, 927 (W.D.N.Y. 1912).

219. 196 F. at 927-28.

220. See *id.*

221. *Id.*

222. *Id.*

223. *Id.* at 927.

224. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991).

225. See *Aeolian Co.*, 196 F. at 927-28.

226. This analysis has itself been rejected. States have recognized that the property rights of the embodied recording were highly valuable. As technology moved from piano rolls to first 78 rpm and later Long Playing 33-1/3 rpm (LPs), the creativity necessary to master and record a sound recording was recognized. In 1971, Congress finally extended

In stopping a party from usurping the “skill and labor of the original manufacturer” of the piano rolls, the court recognized that the balance achieved in the 1909 Copyright Act was the balance between manufacturers of the commodity and the public.²²⁷ By its own terms, the interests of the artist and authors were severely limited once publication or mechanical distribution occurred.

Just as the law had evolved in the previous century, copyright law moved to protect the entertainer and became shaped by the entertainer’s interests only grudgingly, as the economic power of the entertainer coincided with the commercial interests protected by the Act. Congress had moved the law significantly from a limited tool for the protection of maps, books, and charts into the realm of protecting popular entertainment, but the courts generally continued to favor economic interests over artistic endeavors. Protection for artistic endeavors came slowly, consuming well over a century. Not until new technology transformed public lives did the playwright and songwriter truly move into the core of copyright protection.

This same pattern can be seen again in the development of musical performance rights for composers and songwriters.²²⁸ The exclusive right to control musical performances was extended in 1897.²²⁹ Except for the early cases discussing the ability to record piano rolls and phonograph records, only one reported opinion appears to have applied the 1897 performance right. In that case, the court held that a song being used in *The Wizard of Oz* was not infringed when another actress mimicked the performance of the *Oz* star in a comedy revue.²³⁰

Had the court simply ruled that the rights were subject to fair use limitations and the parody was well within traditional notions of comment and criticism, then a good deal of judicial mischief (both

copyright protection to the sound recordings themselves. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391-92 (codified at 17 U.S.C. § 1(f) (superseded)).

227. *Aeolian Co.*, 196 F. at 927.

228. A general public performance right in performers has never been adopted. A limited right exists for digital recordings and transmissions. 17 U.S.C. § 106(6) (2000) (“[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

229. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481-82 states:

Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition . . . shall be liable for damages . . . not less than one hundred dollars for the first and fifty dollars for every subsequent performance.

230. *Bloom & Hamlin v. Nixon*, 125 F. 977, 977-78 (E.D. Pa. 1903).

then and now) could have been avoided. Instead, however, the court first reviewed the lyrics of the song.²³¹ After reprinting them, the court commented:

[C]ounsel are agreed that there is nothing dramatic about either the words or the music. Assuming, for present purposes, that a lyric is capable of being 'performed or represented' in the sense that should be given to those words as they are used by the statute, the question remains, is the song in fact being performed or represented? In my opinion, the question should be answered in the negative.²³²

Having decided there was not much about the song to protect, the court quickly concluded that no protection was available.²³³ The court explained that the defendant's actress "does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation."²³⁴

The results of the only published litigation on the performance right left the musicians without legal recourse. For composers, policing public performing halls was incredibly difficult; documenting which song was improperly performed at which date and time was even more so. The accepted culture of free musical performances meant that composers had neither the artistic nor economic clout to change the perception or enforcement of the law.

The Copyright Act of 1909 heralded a number of changes to the economic status of the composers, signifying a fundamentally different era in the protection of copyrighted works.²³⁵ The new phrasing of the protection for musical works was considered "both broader and more definite" despite a number of textual errors in the musical sections.²³⁶

Interestingly, the more definite language again guaranteed the exclusive rights to public performance of music, but in fewer situations. The statute excluded a number of nonprofit performances by name, stating that,

231. See *id.* at 978.

232. *Id.*

233. See *id.* at 979.

234. *Id.*; cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 n.14-15 (1994) (distinguishing parody from satire for purposes of identifying the amount that may be copied under fair use).

235. See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1075-88; see also *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 477-78 (E.D. S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924) (discussing the two different bills that were debated regarding the 1909 Copyright Act).

236. See BOWKER, *supra* note 141, at 43, 164-65. Bowker labeled the "octavo choruses" as improperly phrased because it "has no musical significance." *Id.* at 164.

nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.²³⁷

This express protection for nonprofit public performances was complemented by an express requirement in section 1(e) that the right extended only when publicly performed “for the purpose of public performance for profit.”²³⁸ The result of this language was a reduction in the rights of composers and songwriters after the expansive 1909 Act was adopted.

The copyright laws are always a balance. For songwriters and composers, the balance was that they received first publication rights over piano rolls and phonograph records. They received a two-cent royalty on all other mechanical recordings made thereafter. What they gave up was merely the public performance right to charitable programs and free concerts.²³⁹ Given their financial success, this limited concession was a small burden, and Congress used the concession to balance the extensive economic rights granted.²⁴⁰ In this balancing, Congress granted the more economically valuable right while withholding exclusive powers over activities that would probably be exercised, if at all, for artistic, political, or content-related reasons, rather than for financial purposes. A composer who objected to student performances of his work could no longer stop the performance. The volunteers at the local church were immunized from asking for permission. These were not economically valuable rights, so they were not as highly valued.

237. Act of Mar. 4, 1909, ch. 320, § 28, 35 Stat. 1075, 1082 (codified at 17 U.S.C. § 104 (superseded)).

238. *Id.* § 1(e), 35 Stat. at 1075.

239. *See id.*

240. Compare this result with the Digital Millenium Copyright Act compromise embodied in the Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, §§ 201-206, 112 Stat. 2830, 2830-34. Like its 1909 counterpart, Congress granted musicians an extension in the term of copyright protection, but balanced it by reducing enforcement rights in certain public venues, bars, restaurants, and stores. *See id.* § 202. These were the same venues protected by the “for profit” designation in the 1909 Act. As Marilyn Bergman, president of ASCAP, lamented “In one sweeping legislative action, the House and Senate have passed copyright-term extension with one hand yet severely curtailed copyright protection with the other.” Bill Holland, *Congress Extends C’right Term; WIPO Passage Seen*, BILLBOARD, Oct. 17, 1998, at 5, 109; Frances Preston, president of BMI was more direct: “It is a sad day for all creators of music in America and intellectual property rights owners.” *Id.*

The economic balance changed one night over dinner. In 1913, noted music lawyer Nathan Burkan hosted nine composers and music publishers to discuss forming a performing rights organization.²⁴¹ This was not the first attempt to organize. The Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) had opened a New York office in 1911.²⁴² Although it had been formed in France in 1851, the opportunity for a performing rights society was only beginning to develop as music halls and other entertainment venues were expanding with silent pictures, nickelodeons, and other amusements. The group agreed to form the American Society of Composers, Authors and Publishers (ASCAP) and began to strategize.²⁴³

One of the primary targets for the group were the restaurants with bands and stage shows.²⁴⁴ Most restaurants refused to pay for musical performance rights, asserting that the "for profit" requirement meant that a separate admission charge was required before the floorshow was a "for profit" performance.²⁴⁵ Any other profit made was for the food, or in the case of the movie theatres, for the film.²⁴⁶ The United States Court of Appeal for the Second Circuit in New York was not amenable to the complaints of the authors and publishers. So, despite some early success for ASCAP, the Second Circuit held that there was no "for profit" standard met without an admission payment.²⁴⁷ As the court explained, the "for profit" requirement "does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."²⁴⁸ Nonetheless, Victor Herbert, a founding member of ASCAP, pushed for Supreme Court review.²⁴⁹

By 1917, when the Supreme Court took up the dispute, silent motion pictures, restaurants, and innumerable clubs had joined the staid opera house or vaudeville theatre, dramatically transforming the nature of nightlife in America. Justice Holmes, writing for a unanimous Court, did not mince words:

241. See GOLDSTEIN, *supra* note 140, at 68.

242. *Id.*

243. See *id.* at 69.

244. See *id.*

245. See *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229, 231 (2d Cir. 1915).

246. See *id.*

247. See *id.*

248. *Herbert v. Shanley Co.*, 229 F. 340, 343 (2d Cir. 1915), *rev'd*, 242 U.S. 591 (1917) (quoting *John Church Co.*, 221 F. at 233).

249. See GOLDSTEIN, *supra* note 140, at 70-71.

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.²⁵⁰

The opinion is a much more elegant restatement of the district court's opinion in the first of Victor Herbert's cases. But most importantly, just as it had recognized the importance of protecting the economic interests of the artists and publishers, the Court was explicit in providing relief from the restaurants free riding on the musical entertainment.

D. Birth of a Notion: The Modern Entertainment Era

The modern era truly began with the invention of the motion picture. "So rapid has been the growth of the motion picture industry that within a quarter of a century after its birth, it has taken its place among the five foremost business enterprises of the country."²⁵¹

The era of the modern motion picture began with the early developments of photography, motion picture cameras, and projectors that could flash each frame of the film onto the screen.²⁵² In 1887, George Eastman perfected a working roll film and Thomas Edison's company used the film to create the first American film camera, which he began marketing successfully in 1888.²⁵³ The relationship between

250. *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

251. LOUIS D. FROHLICK & CHARLES SCHWARTZ, *THE LAW OF MOTION PICTURES INCLUDING THE LAW OF THE THEATRE* v (1918).

252. *See* GERALD MAST, *A SHORT HISTORY OF THE MOVIES* 13 (4th ed. 1986).

253. *See id.* at 14; ARTHUR KNIGHT, *THE LIVELIEST ART* 5 (The MacMillan Co. 1979) (1957). By 1888, Eastman began marketing the Kodak camera with the slogan, "[y]ou press the button, we do the rest." In relation to the history of copyright, it was probably a good thing that Sarony had fought his copyright battle when he did, establishing the legal protection before the instant camera made photography much like the creation of piano rolls.

film and music was not coincidental. Edison's own experimentation with motion pictures came directly from his attempt to add filmed images to his phonograph: "Pictures were not important in themselves to Edison, but were merely to make the phonographic experience fuller."²⁵⁴ Nonetheless, despite his limited interest in motion pictures, engineers at the Edison Company continued to refine cameras. Within a year of Eastman's film, cameras were invented that could make short films.²⁵⁵ Edison patented his invention in the United States in 1891.²⁵⁶ In 1896, Edison purchased the rights to Thomas Armat's motion picture projector, the machine that successfully incorporated the gate into the projector and allowed the 35mm image to be flashed onto the screen for one-sixteenth of a second.²⁵⁷

The modern movie was born. The timing was ripe. Congress had just extended copyright to the public performances of drama and the new technologies of sound, photography, and projection had sprung up to create new media to exploit these rights. Born from Edison's experimentation of the phonograph and protected from its inception by intellectual property laws, the motion picture industry was poised to reinvent the relationship between entertainment and the law.

Both law and technology were necessary for this industrial explosion to begin. As soon as Edison began marketing films, others began copying them. An early court decision held that protection "extended the copyrighting system to 'any . . . photograph,' but not to an aggregation of photographs; and . . . that every photograph, no matter how or for what purpose it may be conjoined with others, shall be separately registered, and that the prescribed notice of copyright

254. MAST, *supra* note 252, at 14.

255. *Id.*

256. *See id.* at 15. Edison failed to pay the additional \$150 for the international patent protection, however, and set off an international race for the creation of motion picture cameras and projectors. Nearly simultaneous inventions in England, France, Germany highlighted the explosion of new technologies at the end of the nineteenth century. *See* KNIGHT, *supra* note 253, at 8-9.

257. MAST, *supra* note 252, at 22. Edison had invented the sprockets for the film, but while those allowed for synchronous timing, other problems remained. Another of the important technical developments was the "Latham Loop," first invented for a camera rather than the projector. *See id.* at 20. A "Latham Loop" consisted of a small loop of film float just before the gate, protecting the film from tightening and ripping. *Id.* Edison's true genius was to purchase the patent rights to the "Latham Loop" and the Armat projector to use with his sprocketed machine, a design that has not been significantly changed in film projectors in this century. *See generally* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (discussing the extent of patent rights for motion picture machines).

shall be inscribed upon each of them."²⁵⁸ The Court of Appeals reversed,²⁵⁹ but in the five-month period following the lower court decision, Edison had abandoned his company's filmmaking.²⁶⁰ With the reversal of the decision, the company returned to production and ultimate control of the film industry for the next decade.²⁶¹

The legal attitude towards the entertainment industry changed with the introduction of luminaries like Eastman and Edison. While the law may have treated all comers alike, the sophistication of the practice and the stakes were not perceived as great when the Great Wallace Show fought to protect its posters as compared with when the Edison Company sought to enjoin economic injury for its works. The law of copyright remained an economic balancing, but now the balance was weighted in favor of the movie producers.

Justice Holmes again had the opportunity to shape the future of the entertainment field with his opinion involving one of the first film adaptations of a popular novel, *Ben Hur*.²⁶² Holmes extended the approach laid down in *Daly* that an infringement may occur even if done through pantomime.²⁶³ This is important because otherwise the silent films would all be immune from liability. Holmes's approach also treated motion pictures as another form of drama, which had the benefit of fitting into the protections for dramatic presentations.²⁶⁴

Holmes's approach provided for unambiguous protection to authors against filmmakers and ensured that filmmakers could not reproduce the films of their competitors. Had the Court limited the protection to photographs, then the dramatization rights under section 1(b) of the 1909 Act would have been the basis for legal protection, likely increasing uncertainty for years.

258. *Edison v. Lubin*, 119 F. 993 (E.D. Pa.), *rev'd*, 122 F. 240 (3d Cir. 1903), *appeal dismissed*, 195 U.S. 625 (1904).

259. *Edison v. Lubin*, 122 F. 240, 243 (3d Cir. 1903).

260. SAMUELS, *supra* note 143, at 61.

261. *Id.*

262. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60 (1911); SAMUELS, *supra* note 143, at 57-59.

263. *See Kalem*, 222 U.S. at 61.

264. Justice Holmes wrote:

The essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression—what we see—is caused by the real pantomime of real men through the medium of natural forces, although the machinery is different and more complex.

Id. at 61-62.

The dramatic rights approach had an interesting, unintended consequence. Through Harper Brothers, General Wallace, *Ben Hur*'s author, had licensed the play for a Broadway production. Fourteen years later, the play's producers sought to use their license agreement to create another film version of *Ben Hur*.²⁶⁵ Wallace and the Harper Brothers objected, but the court, reviewing the terms of the license agreement, held that the language was unambiguously limited to the stage performance.²⁶⁶ The court went further, however, and addressed what impact the sale of the dramatic rights for the stage had on the dramatic rights for film:

In my opinion, there is implied a negative covenant on the part of the plaintiffs (the grantors of defendants' restricted license) not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensees' estate. Admittedly, if Harper Bros . . . permitted photo-plays of *Ben Hur* to infest the country, the market for the spoken play would be greatly impaired, if not destroyed. This being the fact, the law is analogous to that which implies, from a covenant to make a certain use of property, a covenant negative against doing anything else with it.²⁶⁷

While this may have been an issue that could have been appealed, particularly given the litigation history and the explicit knowledge of a book's valuable film rights, the parties chose to work together. Ultimately the Broadway producers negotiated a fifty percent royalty, leading to the first blockbuster money loser.²⁶⁸ The film grossed \$9 million, but lost \$850,000 after payment of the royalties.²⁶⁹

Justice Holmes again weighed in on the balance of economic interests in copyright in *Manners v. Morosco*, a dispute regarding the production rights to *Peg O' My Heart*.²⁷⁰ Holmes endorsed the *Harper Bros.* approach by recognizing "the impossibility of supposing that the author reserved the right to destroy the value of the right granted."²⁷¹

265. See *Harper Bros. v. Klaw*, 232 F. 609, 612 (S.D.N.Y. 1916); SAMUELS, *supra* note 143, at 58.

266. See *Harper Bros.*, 232 F. at 612.

267. *Id.* at 613.

268. SAMUELS, *supra* note 143, at 59.

269. *Id.*

270. See 252 U.S. 317, 323 (1920).

271. *Id.* at 326. The majority only reached the issue of the film grant after it disposed of the claim that the rights to all production had terminated under a five-year provision of the agreements. See *id.* at 325. Justice Clarke's dissent provides a far better analysis of the contract than that of the majority, but the Court may have been so eager to review the grant of film rights that it glossed over the more fundamental flaw in the lower courts' decisions. See *id.* at 327-29 (Clarke, J., dissenting).

Instead of granting the film rights to the Broadway producer, however, Holmes adopted the language of the *Harper Bros.* court, enjoining both parties from making a motion picture version of the play.²⁷²

The lower courts had granted the film rights to the Broadway producer under a license providing the producer "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada."²⁷³ Holmes pointed out that the remainder of the contract provided the playwright the power to control the play's development.²⁷⁴ For example, the contract provides that "[n]o alterations, eliminations or additions are to be made without the approval of the author and the rehearsals and production of the play are to be under his direction."²⁷⁵ As such, the contract does not suggest that a silent, motion picture adaptation could be made. As a practical matter, if the lower courts' decisions had been affirmed but this provision enforced, the result would have been the same, because no right to make a silent picture could be exercised without the author agreeing to the pantomime version of the script.

By adopting the analysis of *Harper Bros.*, the Supreme Court dramatically changed the bargaining power of the two parties. The Court assumed, seemingly with no evidence before it, that because the parties disagreed as to the scope of the rights granted, an implied understanding must have existed. Put another way, the Court imposed an assumption that Harper Brothers would not have reserved the film rights, nor would the Broadway producers have allowed Harper Brothers to keep the film rights, because of the damage such rights would have done to the stage play. While this point is often negotiated in rights agreements, many examples exist showing that the assumption cannot be universally applied.

Contemporaneous productions based on public domain works often coexist. No publicly available study empirically analyzes the market impact of prior release in other media, but anecdotal evidence suggests that the threat may be overstated. This is particularly true when the story is already known, such as when the works are derived from a popular novel or factual incident. Theatre and film producers are intensely concerned with the acquisition of the nonfilm rights, but the reason is driven more to control the marketing of the project and

272. See *id.* at 327.

273. *Id.* at 323.

274. See *id.* at 324.

275. *Id.*

participate in the income of the other media than out of any actualized market destruction.

In the case of *Ben Hur*, the result is even more striking. The play had run for fourteen years, and according to the court, "the public might [have been] growing tired of the play as shown with actors speaking on the stage."²⁷⁶ In other words, the economics of the relationship were coming to an end. By creating a negative covenant not to compete in other markets, the Court increased the value of the stage rights dramatically at the expense of the underlying rights holder.

In the case of *Peg O' My Heart*, the result is patently unfair to the playwright. The strained interpretation of the initial grant of rights extended a five-year contract into perpetuity.²⁷⁷ Following that, the Court enjoined both parties from developing film rights.²⁷⁸ This was hardly the arrangement bargained for when the author negotiated that his wife star in the play as a first-class production for a maximum of five years.²⁷⁹ Nonetheless, the case illustrates the interpretation of contracts granting copyright licenses. Nowhere was there a discussion of the playwright's need to control the production, the concern that poorly mounted productions can dramatically affect the opportunity to present future plays, or the artistic control that was central to the face of the contract.²⁸⁰ Instead of the rights explicitly before the Court in the language of the contract, Justice Holmes and the majority focused on rights that must necessarily be at stake by implication: the competitive economic interests of the producers to avoid destructive competition.²⁸¹

The Court went so far as to recognize that the parties were concerned with the artistic elements of the license, but they were used merely to illustrate the limits on the distribution of the commodity:

The stipulations against alterations, eliminations or additions, and that the rehearsals and production of the play shall be under the direction of the author, denote the same thing, and clearly indicate that no other form of production is contemplated. The residuary clause, so to speak, by which the play is to drop to stock companies shows the lowest point to which the author was willing to let it go.²⁸²

276. *Harper Bros. v. Klaw*, 232 F. 609, 610 (S.D.N.Y. 1916).

277. *See Manners*, 252 U.S. at 325.

278. *See id.* at 327.

279. *See id.* at 324.

280. *See generally* Jon Garon, Note, *Director's Choice: The Fine Line Between Interpretation and Infringement of an Author's Work*, 12 COLUM.-VLA J.L. & ARTS 277 (1988) (discussing the importance of first performance rights for playwrights).

281. *See Manners*, 252 U.S. at 326-27.

282. *Id.* at 326.

Framed in terms of quality assurance, the stock production provision fits in nicely with other sales contracts for the distribution of commodities.

The Supreme Court was very slow to embrace any respect for films as artistic endeavors. As discussed in the next Part, the Court was explicitly hostile to the notion that films were an expressive forum for public discourse. They were not worthy to be traded in the marketplace of ideas.²⁸³ Despite this disrespect for the content of films, the Court recognized the importance of their economic power and, as a result, protected those rights expansively.

E. The Copyright Road Traveled

As the stage, music, and film industries developed, Congress and the courts expanded the copyright laws to meet their growing needs. By 1920, each of these entertainment fields had received unparalleled economic protection under copyright commensurate with its growth.²⁸⁴ In each area, the rights were acquired when the field had matured to the point where the economic opportunities were too large to allow a competitor to take a free ride on the labor of the entertainment industry.

Throughout the growth of the early entertainment industry, the United States remained rather isolationist. In 1886, the Berne Convention was formed to provide national treatment, extending to foreigners all the copyright protections a country would give its citizens.²⁸⁵ Signing the Berne Convention would have greatly extended the term of copyright, vested copyright upon fixation, and provided moral rights to the authors.²⁸⁶ The first bill to amend the 1909 Copyright Act and join the Berne Convention was presented to Congress in 1922, but it did not succeed.²⁸⁷ Instead, efforts for the United States to join the Berne Convention were not successfully concluded until 1988, slightly more than a century after its inception.

283. See *infra* notes 409-419 and accompanying text (discussing *Mut. Film Corp. v. Indus. Comm'n*, 236 U.S. 230 (1915), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

284. See generally FROHLICK & SCHWARTZ, *supra* note 251, at 499.

285. ARTHUR B. HANSON, OMNIBUS COPYRIGHT REVISION 11 (1973). This book was prepared by the Cambridge Research Institute on behalf of Congress.

286. *Id.* at 11-12. "According to the 1928 Rome revision of the Berne convention, 'moral rights' consist of the author's right to claim authorship of the work and the 'right to object to any distortion, mutilation, or other alteration of the work that would be prejudicial to his honor or reputation.'" *Id.* at 12.

287. See *id.* at 11-12.

Unlike England, the United States chose not to protect the rights of musicians and playwrights until late in the nineteenth century. The United States did not grant a preferential copyright term to artists. Although the statute called for the protection of fine art in 1870, the designation did not entitle the holder to special privilege, and the courts quickly eroded any distinction between art and commercial illustrations. In the early debate over the Berne Convention, the motion picture industry raised concerns that the term of copyright should not be extended from the twenty-eight years with a renewal period of an additional twenty-eight years to the modern formulation of life plus a period of years because "they wanted to use copyrighted novels and stories as the basis of films."²⁸⁸ Copyright policy remained unaltered to benefit the movie industry at the expense of the authors, composers, and artists.

This summary is not a listing of America's failings in protecting the artist.²⁸⁹ Instead, it serves as a reminder of the choices Congress and the courts have made in developing copyright law in the United States. The point is not that copyright is unavailable for the entertainer and the artist, but that its development was steered by the growth of the entertainment industry rather than the art form or the technology.

Only when the industry was mature did the law begin to protect the property interests. In almost every dispute, the tension was between two economically sophisticated interests using the tensions inherent in copyright to redistribute the bargaining leverage. Enforcement of the performance right in music took twenty years. It began when ASCAP, an economically sophisticated organization, began to represent the interests of the songwriters and the publishers.

The interests shaping the congressional debate are fairly well accepted, and the purpose of the courts is to enforce the statutory rights created by Congress, so there may be no need to illustrate the parallel agenda of the courts. Still, in many ways, the Supreme Court led the nation beyond the congressional compromises, indelibly stamping copyright law with its singular value judgments on the economic importance of copyright; that what is good for the content producers is good for the public.

288. *Id.* at 12. The report noted, however, that "[w]ith the increased use of old movies on television, motion picture producers discovered that a longer copyright term would benefit them." *Id.*

289. I can see how some commentators could construe this as the "moral rights path not taken." While that path is an alternative to the path embraced in the United States, it is not my purpose to suggest that we failed by refusing that choice.

The Court's approach is best illustrated by a case in which copyright was unavailable. In *International News Service v. Associated Press*, the Court had to weigh the right of the International News Service (INS) to reprint news stories written by the Associated Press (AP) or by journalists at newspapers that were members of the AP's news-sharing service.²⁹⁰ The *best* solution to the AP claim would have been a congressional choice to join the Berne Convention or at least to accept its principle that copyright should subsist without the requirement of registration and deposit.²⁹¹ As a competitor, INS had a difficult time showing its general good faith in the healthy competition for distributing the news. INS had already been enjoined by the district court from bribing journalists or from inducing newspapers to send it advance copies of stories in violation of the AP bylaws.²⁹² Still, the use of uncopyrighted material was free to anyone, so the remaining claim was dismissed by the lower court.²⁹³

The Supreme Court reversed, finding against INS even for its unfair exploitation of AP's interest in the timeliness of the news, the so-called hot news exception.²⁹⁴ The case includes both a concurrence by Justice Holmes and a dissent by Justice Brandeis, distilling much of the Court's debate on intellectual property.²⁹⁵

The majority opinion authored by Justice Pitney took a strong stance to protect the economic interests of AP.²⁹⁶ As to copyrighted authorship, the majority is rather dismissive: "It is not to be supposed that the framers of the Constitution, when they empowered Congress . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the

290. 248 U.S. 215, 230-31 (1918).

291. *Id.* at 233. ("Complainant's news matter is not copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily . . .") Justice Brandeis points out that Congress had assessed particular legislation to address the problem but rejected it. *See id.* at 264-65 (Brandeis, J., dissenting). In 1886, the Committee on the Library rejected the following protection that would have readily addressed the situation:

That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the Territories thereof, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words.

Id. at 265 n.1 (Brandeis, J., dissenting) (quoting S. 1728, 48th Cong., 1st sess. (1884)).

292. *See id.* at 231.

293. *See id.* at 231-32.

294. *See id.* at 245-46.

295. *See id.* at 246-48 (Holmes, J., concurring); *id.* at 248-67 (Brandeis, J., dissenting).

296. *See id.* at 234.

knowledge of it."²⁹⁷ Nonetheless, the Court does see a public interest in protecting the distribution of the

daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.²⁹⁸

The Court framed unfair competition law as a matter of significant public interest. The Court therefore was willing to extend it to the otherwise unprotected activity of copying uncopyrighted works:

The question here is not so much the rights of either party as against the public but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.²⁹⁹

The economic rights were recognized and protected.

Justice Holmes, the author of many of the seminal copyright cases, concurred but suggested the Court should reach the result in a more modest manner. He pointed out that the legal dispute before the court is one of unfair competition, so that if *INS* is doing anything wrong it is suggesting that the content of its stories was gathered by its members.³⁰⁰ Holmes suggested the more modest remedy of requiring proper attribution of the copied stories:

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them—in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a

297. *Id.*

298. *Id.* at 235.

299. *Id.* at 236 (citation omitted).

300. *See id.* at 246-47 (Holmes, J., concurring).

way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned.³⁰¹

Justice Holmes's concurring opinion recognized the importance of copyright law, but also reinforces the limits Congress and the courts have developed for the body of law. The limitation he pressed on the Court is designed to separate the case from an extended copyright case, which it has become,³⁰² to a nearly run-of-the-mill unfair competition case that would have anticipated the language of section 43(a) of the Lanham Act.³⁰³ Unlike the majority, Holmes's proposed remedy gave the AP far less control over the unprotected, uncopyrighted works. By choosing its broader decision, the Court valued the economic rights of AP over the law of copyright itself.

Justice Brandeis's dissent provided the most strident alternative voice in the debate. As protected expression, Brandeis was dismissive:

If news be treated as possessing the characteristics not of a trade secret, but of literary property, then the earliest issue of a paper of general circulation or the earliest public posting of a bulletin which embodies such news would, under the established rules governing literary property, operate as a publication, and all property in the news would then cease.³⁰⁴

Copyright, however, was not Brandeis's concern. The coauthor of United States privacy law and early advocate for expansive First Amendment protection, Brandeis recognized the dangers inherent in giving any expansive monopoly power to news gathering. Unlike the rest of the Court, Brandeis saw the issue as one of social policy. Ironically, Brandeis thought that the legislature, rather than the courts, should be the source of protection,³⁰⁵ if any should be created, so that it would be more narrowly crafted:

Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in

301. *Id.* (Holmes J., concurring).

302. *See generally* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (denying misappropriation protection for live sports scores delivered to defendant's subscribers' pagers).

303. *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000) (protecting unregistered marks from being marketed with a false designation of origin).

304. *Int'l News*, 248 U.S. at 256 (Brandeis, J., dissenting).

305. *Contra* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443-44 (N.Y. 1902) (discussing evils of a court extending the common law rules).

the interest of free speech) to restrain actionable libels, and for other reasons decline to protect by injunction mere political rights

....
Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear.³⁰⁶

Ultimately, in Brandeis's view, the protection of the AP's interests are not outweighed by the social implications that might flow from granting it an injunction. Brandeis's view captures the essence of the social and political concerns embedded in information policy, areas in which his voice held much greater weight when addressing privacy and First Amendment policy.

Holmes's careful balancing approach reflects his ability to capture the essence of the law's policy. For the AP, his approach would have offered only a pyrrhic victory, continuing to balance the economic rationale for copyright against the need for robust competition. Holmes's model was to provide robust protection for rights granted, but not to imply the creation of any new rights.

The prevailing opinion of the majority ignored Brandeis (as it often did in that era) and took Holmes's earlier decisions protecting economic interests too much to heart. The AP was granted a brief ownership in its news, elevating the property interests in news gathering as the best way to protect the public interest in having the news be as fresh as the orange juice delivered daily to the breakfast table.³⁰⁷

Ultimately, the debate among the justices of the Court highlighted the range of interests the Court was viewing in intellectual property law. On one hand, no discussion appeared regarding copyright's preemption of state unfair competition law; on the other, suggestions that news could not be copyrighted were quickly dismissed.³⁰⁸ The entire debate focused on the economic interests and their distribution

306. *Int'l News*, 248 U.S. at 266-67 (Brandeis, J., dissenting) (footnotes omitted).

307. *See id.* at 236.

308. *See id.* at 234.

among the parties.³⁰⁹ Both the majority and dissent spoke of the essential public policy of maximizing the dissemination of the news, the majority through protection of the news-gathering process, the dissent through the freedom to disseminate everything not protected by copyright.³¹⁰

The Court paralleled and often led Congress in its emphasis on protecting the economic interests of the content producers as the underlying purpose and character of intellectual property law. The economic lens through which Congress and the courts view copyright served the interests of the entertainment industry well. Beginning in the 1920s, as Congress fruitlessly debated the merits of revising the copyright laws, the new nature of the debate became apparent. The Register of Copyright duly noted this trend:

It may be said that in general the major controversies were rooted in the conflicting interests of the various author and publisher groups on the one hand, and the user of copyrighted material, such as broadcasters, motion picture producers, and record manufacturers, on the other. Each effort to revise the law resolved itself into an attempt to reconcile this conflict of interest through extended discussion and negotiation with the various groups concerned in order to work out compromise solutions to the controversial issues. Such an attempt was successful in the enactment of the 1909 revision and almost succeeded ... in 1931.³¹¹

309. *Id.* at 236-42. The Court had to weigh the right of INS to reprint new stories written by the AP or by journalists at newspapers that were members with AP's news-sharing service.

310. *See generally id.*

311. HANSON, *supra* note 285, at 13-14 (quoting U.S. Copyright Office, Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess. 11 (Comm. Print 1960)). *Cf.* A.A. GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954, at 9-10 (1957) (available Franklin Pierce Law Center Library) (describing the Vestal Bill, H.R. 12549, 71st Cong., 3d Sess. (1930)). "The Vestal bill, coming so near to enactment in the 71st Congress, marked the high tide of the efforts to revise the law for adherence to the Berne Convention." *Id.* at 10.

The Report of the 1931 legislation effectively contrasts the roles of the various entertainment industries. "It has been found that practically all the industries and all the authors have united in support of this revision. The authors, playwrights, screen writers, composers motion picture producers, the newspapers and magazines, the allied printing trades [sic] unions, the librarians, the majority of the theatrical managers, all of these have appeared at the hearings and have supported the principles of the bill." *Id.* at 9 (quoting H.R. REP. NO. 71-1689 (1930)). The 1931 Bill passed the House of Representatives only to be scuttled in the Senate, where it was opposed by "the radio broadcasters who were opposed to the fundamental principles of automatic copyright; the theatrical producers who opposed divisible copyright; and the manufacturers of coin-operated phonographs who objected to the elimination of the juke-box exemption." *Id.* at 10.

Although the Copyright Office described even the debate of the 1909 Copyright Act as a negotiation between the users and the producers, none of the "users" identified in the preceding paragraph existed in 1906 at the time of the 1909 debate. Except for the piano roll manufacturers and the jukebox operators, the industry of copyright "users" had not yet formed. Within a decade, however, these interests grew from curiosities to economic powers, setting international trade policy and transforming copyright into the law of the entertainment industry.

One other Supreme Court decision may illustrate the impact of the entertainment industry on the nature of copyright. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court repudiated one of the historically significant props supporting copyright protection: the diligence and effort that an author put into a work.³¹²

The significance of *Feist* is more than that it ended the sweat of the brow doctrine by requiring minimal creativity, but that it ended a century of constructionist originality by replacing it with creativist originality.³¹³ No longer could work be owned simply because of the effort it took to create it. Instead an author had to create something at least minimally unique. The sweat of the brow doctrine was entirely consistent with the economic basis of copyright and implicitly endorsed in *International News Service* because it was the usurpation of economic interests that was being protected by the Court. This, in fact, was exactly what the courts had done, beginning with *Aeolian Co.*, in which the court barred the copying of piano rolls and phonorecords that were not themselves protectible under copyright.

312. The Court explained:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

499 U.S. 340, 345 (1991) (citations omitted); see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990) (discussing authorship as "translation and recombination" rather than originality).

313. See Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT L.J. 249, 257-58 (1997).

The legacy of misappropriation protection was finally eliminated by a 1971 amendment to the 1909 Copyright Act.³¹⁴ The interests in protecting against record piracy far outweighed the niceties of minimal creative necessity.³¹⁵ Like photography, the choices made (or overlooked) in fixing the sound recording is sufficiently creative to meet the originality requirement under *Feist*.

As the nature of copyright has changed over time, the traditional protection of copyright has moved from a more expansive, constructionist approach to what Professor Ginsburg describes as personality-based protection.³¹⁶ The creativist or personality-based model has not been viewed as such by the courts. Rather, the courts continue to advance a primarily economic rationale for copyright protection. The difference is that now the entertainment industries—film, television, music, publishing, etc.—are the driving economic force. Minimal but necessary creativity remains at the heart of this economic model, but against this backdrop, the rationale for protecting databases and phone books seems strangely at odds with the Copyright Act. In essence, as the entertainment industry has moved into the central economic role, the other content producers that could benefit from low levels of anticopying protection have been moved out of copyright entirely.³¹⁷

Entertainment has redefined copyright itself.

IV. CENSORSHIP LAWS AND THE FIRST AMENDMENT

The history of entertainment in Western society has been a tug-of-war between public adulation and outrage. The theatres of Elizabethan England were often shut down due to scandalous conduct, and William Shakespeare was forced to change the character of Falstaff because the riotous knight drew the ire of members of the Queen's court.³¹⁸ In the United States, these laws primarily manifested

314. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391-92; see *Goldstein v. California*, 412 U.S. 546, 548-49 (1973).

315. See Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2196-97 (2000).

316. Ginsburg, *supra* note 140, at 1868 (tracing the beginning of the change to the late-nineteenth century, personality-based concept of copyright).

317. See *id.* at 1907-08. Professor Ginsburg makes a compelling case for copyright protection for works of "low" authorship. See *id.* Her suggestion that there be differing copyright regimes for different types of works becomes critical, given the overstated emphasis on economic rights for even the personality-based works. See *id.*

318. See *supra* note 8 and accompanying text.

in the forms of censorship,³¹⁹ motion picture production ordinances,³²⁰ and blue laws.³²¹ Every form of entertainment has had some censorship.³²² The historically significant impact of the entertainment industry is found not in its struggle to achieve protection from censorship under the First Amendment, but that the struggle has been allowed to take place at all.

The First Amendment was drafted as an absolute limit on federal congressional power. The nineteenth-century political conflict expanded the limitations on free speech, weakening its absolutist rigor, but paving the way for broader coverage of the right. The twentieth-century analysis that has posited the position of the prohibition as euphemistic was necessitated by a much broader definition of speech than that intended by the framers of the Constitution. As film, music, and theatre have moved into the expressive realm, however, the absolute prohibition has been emasculated, leaving a weakened barrier to regulation that can be pierced through narrow tailoring and self-serving findings of necessity. The real effect of entertainment law has been to broaden First Amendment protection to a much more inclusive definition of speech, but severely curtail the absolute protection afforded to political speech.

A. *The Negative Constitution*

The Constitution was drafted as a series of limitations placed on the newly formed federal government, containing a balance of power between the state and federal governments as well as between the government and the governed. The intent was to shape carefully and limit the powers of this government over the states and the people. As Madison explained, "[i]t is of great importance in a republic not only

319. See generally Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986) (tracking judicial refinement of the First Amendment); Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992) (discussing the evolution of censorship law in the U.S.); Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87 (1939) (same).

320. See Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 LOY. L.A. ENT. L.J. 1, 33 (1996) (tracking the expansion of free speech into the production, as well as dissemination, of film content).

321. Blue laws are statutes or ordinances banning immoral activities on Sunday, which is reserved as a day of worship. See *Carolina Amusement Co. v. Martin*, 115 S.E.2d 273, 276 (S.C. 1960) (upholding Sunday ban on showing of motion pictures); FROHLICK & SCHWARTZ, *supra* note 251, at 391 (citing pre-1917 cases concerning blue laws).

322. See Garon, *supra* note 149, at 500 (citing examples of censorship in various forms of entertainment).

to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."³²³ The Constitution itself, through the definition of sedition and the limited scope of federal authority, had been carefully crafted to satisfy those objecting to a federal government and to strip it of any power to silence the press or use the laws of treason to control speech.³²⁴

According to Hamilton, the protections of speech, press, and petition were not missing from the Constitution because they were not needed.³²⁵ The Constitution had no need to state those many things that the federal government could not do, because such a list was infinite. The Constitution was designed to repudiate the tyranny of England. The evils suffered by the survivors of the American Revolutionary War included claims of sedition, illegal searches, quartering of troops, and taxation without representation. Hamilton makes this point by listing the bill of rights concepts incorporated into the main text of the Constitution: limitations on impeachment, the privilege of habeas corpus, no writs of attainder, no ex post facto laws, no titles of nobility, the right to jury trial, and the limits on the definition of treason requiring "the testimony of two witnesses to the same overt act."³²⁶

Regarding the constitutional silence on the subject of the press, Hamilton is explicit. He questions the meaning of the term, a debate that has continued unabated to this day. In response to those demanding a protection against press censorship, he asks "[w]hy, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"³²⁷ Hamilton raised fears that any statement on the press could be used to expand the federal government's jurisdiction:

323. THE FEDERALIST NO. 51, at 357-58 (James Madison) (Benjamin Fletcher Wright ed., 1961).

324. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 117-18 (1984). Professor Mayton states:

James Iredell in North Carolina explained that "the future Congress will have no other authority over [the press] than [copyright laws] If the Congress should exercise any other power over the press than this, they will do it without any warrant from this Constitution, and must answer for it as for any other act of tyranny." This consensus included those opposed to the Constitution. Richard Henry Lee, one of the more learned and influential of the Constitution's opponents was, as he said, bound to "confess I do not see in what cases the congress can, with any pretense of right, make a law to suppress the freedom of the press."

Id. at 118 (alterations in original) (quoting PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 316, 360-61 (Paul Leicester Ford ed., 1968) (1888)).

325. THE FEDERALIST No. 84, at 534-35 (Alexander Hamilton).

326. *Id.*

327. *Id.* at 535.

"[Legislators] might urge . . . that the provision against restraining the liberty of the press afforded a clear implication, that a right to prescribe proper regulations concerning it was intended to be vested in the national government."³²⁸ Hamilton argued against the entire Bill of Rights as implying constructive powers into the Constitution.

Hamilton, of course, was defending the Constitution as drafted. While others, like Madison, were urging a Bill of Rights, the more minimalist approach was deemed more apt to be ratified. The more contentious Bill of Rights, therefore, came later, starting with the first Congress.

The Constitutional Convention included a brief discussion of the new government's power over the press. A proposal was made that the Constitution state that "the liberty of the press should be inviolably observed."³²⁹ It was defeated with the following explanation: "It is unnecessary—[t]he power of Congress does not extend to the Press."³³⁰ Instead, the Constitution was ratified at the convention with a very powerful, explicit statement:

Whereas the powers granted under the proposed Constitution are the gift of the people, and every power not granted thereby remains with them, . . . and, among other essential rights, liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.³³¹

This statement reinforced the notions articulated by Hamilton that the Constitution was limited and that the powers were not to be extended. That this model lasted for less than three years³³² does not change the correctness of the position at the time. Time, however, marches on.

B. The Many Rights Counted as First

As drafted, the Constitution did not give any positive right to the federal government to regulate the press. Necessarily, however, once the Bill of Rights was introduced, the essential negative right was included, or else those opposed to the Bill of Rights would be proved

328. *Id.*

329. 2 The Records of the Federal Convention of 1787, at 617 (Max Farrand ed., 1911).

330. *Id.* at 618.

331. See Mayton, *supra* note 324, at 119 (alterations in original).

332. Congress was urged to adopt a Bill of Rights by President Washington in his inaugural address. On Sept. 25, 1789, Congress took up the issue. The first draft, predominantly written by James Madison, contained twelve amendments, of which most were substantially rewritten, and articles three through twelve were ratified. In 1791, these ten Amendments to the Constitution were adopted.

correct that by negative implication those items left unenumerated would eventually become powers of the federal government, notwithstanding the Tenth Amendment, which reserved all rights not granted to the States.

In drafting the Bill of Rights, Madison concerned himself not only with the dangers of the government aggregating power, but also of the majority tyrannizing the minority, who might have their liberty stripped away by those in power.³³³ The First Amendment as written may have only captured a small portion of Madison's concerns. However, the Senate changed the text, shifting the focus from the people to the federal government.³³⁴

The amendment finally adopted contained a number of distinct, but conjoined clauses: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."³³⁵ Each of these clauses is distinct but interrelated. Because the power to regulate the press or speech had never been granted to Congress, the First Amendment was drafted as a negative right, a further reminder of the limitation on the federal government.³³⁶ Religion was included in this same provision, but the power enumerated was the broader term, "respecting" an establishment of religion. Like religious exercise, the rights of petition and assembly were each separate and distinct rights under English law.

Although beyond the scope of this Article, at least one historical comment is worth noting on the possible relationships among the clauses.³³⁷ Madison, the primary drafter of the Bill of Rights, explains

333. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1144 (1991). Madison states:

But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or the legislative departments of Government, but in the body of the people, operating by the majority against the minority.

Id. at 1148 (quoting 1 ANNALS OF CONG. 454-55 (J. Gales ed., 1789) (1st ed. pagination) (June 8, 1789)).

334. Mark P. Denbeaux, *The First Word of The First Amendment*, 80 NW. U.L. REV. 1156, 1168 (1986).

335. U.S. CONST. amend. I.

336. See Denbeaux, *supra* note 334, at 1167 n.39.

337. There remains a commonality in the clauses because each is a communicative act. Religion is rarely prosecuted. Conducting illegal teaching of doctrine, giving sermons

his views on the need to regulate the power of government and the power of the majority:

If a majority be united by a common interest, the rights of the minority will be insecure In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.³³⁸

The juxtaposition was an intentional message. As one First Amendment historian commented, "The absence of freedom of speech, especially on religious subjects, in seventeenth-century Massachusetts is so familiar a fact that a mere reminder should suffice."³³⁹ Speech and religion were as linked as speech and politics. The protections of the First Amendment were all of a kind.³⁴⁰

The structure in Madison's logic and the text are clear. Each of these rights is distinct, but they are all tied together in the common desire to allow for the minority to be free of tyranny from the government and the majority. The amendment, however, was a mere step in this direction. Madison's original draft did not include the limitation that "Congress shall" but rather was drafted to encompass

on banned topics, holding prayer meetings, printing banned liturgy, and other communicative acts are violations of the law for which punishments have been historically meted. Freedom to conduct one's own religion without the right to free speech might have quickly devolved into a weakened privacy right so that only rituals in one's home were beyond the power of the government to reach. A religious organization that failed to invoke the name of the Father, Son, and the Holy Ghost (or Allah or HaShem), to recite that we are "One nation under God," or to state "in God we Trust" prior to each session, could have been found to violate the laws because it was merely a statute on the language necessary to conduct a sanctioned meeting. Religious freedom alone might not have been held to stop such intrusion, but alongside prohibitions on laws abridging speech the obligation to provide constitutional protection becomes much stronger.

338. THE FEDERALIST No. 51, at 358 (James Madison) (Benjamin Fletcher Wright ed., 1961).

339. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 30 (1960) (discussing convictions beginning in 1635 for acts including seditious sermons, petitions against civil authority, improper religious speech, and seditious libel).

340. The Supreme Court continued to be mindful of this juxtaposition:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

absolute rights or ideals.³⁴¹ Nonetheless, the first step at national protection was made.

Each of the clauses in the First Amendment is reflective of a distinct English and colonial tradition during the drafting of the Constitution and the Bill of Rights. A brief understanding of the then-contemporary meaning of each clause (except those of religion) will help frame the later discussions of the First Amendment.³⁴²

1. "The Right of the People Peaceably to Assemble and to Petition the Government for Redress"

The oldest right, listed last, is the ability to petition the government for redress.³⁴³ It preceded even the Magna Carta as a fundamental component of English law.³⁴⁴ The right to petition was the protection from prosecution for a properly structured claim for relief. Simply put, the right was a form of safe harbor, providing protection from a claim of sedition or libel when the form of the request was correctly structured.³⁴⁵ The power to petition the government was adopted by each of the colonies.³⁴⁶ It was a fundamental part of participatory government, allowing groups of people to address common complaints.³⁴⁷

The right needed protection to be fully robust. Various historical attempts had been made to limit the right by limiting the number of petitioners, the structure of the petition, and the proper recipients of the petition.³⁴⁸ Any such law could abrogate the fundamental nature of the petition while masquerading as a mere technical regulation. The colonists would brook no such limitations. To the colonists and Americans ratifying the Bill of Rights, this was a long-held and highly

341. See Amar, *supra* note 333, at 1137.

342. I have excluded a deeper discussion of the Establishment Clause and the Free Exercise Clause because subsequent history has tended to separate them from the other provisions.

343. U.S. CONST. amend. I.

344. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2163 (1998).

345. See *id.* at 2170-72.

346. See *id.* at 2177.

347. See *id.*

348. For example, Blackstone's *Commentaries* states:

[N]o petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; and in London by the lord mayor, alderman, and common council: nor shall any petition be presented by more than ten persons at a time.

1 WILLIAM BLACKSTONE, COMMENTARIES *143 (footnote omitted) (emphasis added).

valuable right, inexorably linked with responsive government and fully formed in structure and substance.

The right to assemble was a similarly explicit, limited right, as viewed by the members of the Philadelphia debates on the Bill of Rights. The right to assemble is one of the rights Hamilton would have identified as already existing in the Constitution, the right to amend or revoke the document and reform the federal government by will of the people as necessary. The preamble to the Constitution "implied a right of 'the People' (acting by majority vote in special conventions) to alter or abolish their government whenever they deemed proper: what 'the People' had 'ordain[ed] and establish[ed]' (by majority vote in special conventions), they or their "posterity" could dis-establish at will (by a similar mode)."³⁴⁹

Today, the meaning of assembly can be construed much more broadly than that implied by the political definition at the time of the Constitution. Congregations assemble as a prerequisite for prayer service; political activists assemble crowds as a means to promote their messages; audiences assemble to participate in the spectacle of sport and entertainment. Each of these is an assembly, but not the historical type of political assembly envisioned in the Constitution or by the public that ratified and amended it.³⁵⁰ The text joined together the right to assemble and to petition as forms of sharing grievances with the government. By placing in the Amendment the phrase "the right of the people peaceably to assemble and to petition the Government for redress" certainly reflects a particular understanding of assembly. Both assembly and petition were rights to seek redress from the government.

2. "Congress Shall Make No Law . . . Abridging the Freedom of Speech, or of the Press"

The clause granting freedom of the press and speech is perhaps the most contentious clause of the First Amendment. The battle regarding its meaning begins with the Federalist Papers, continues through Joseph Story's *Commentaries on the Constitution of the United States*, and remains at the heart of today's constitutional debate. The debate stems from the phrase "Congress shall make no law." From the time

349. Amar, *supra* note 333, at 1153. Professor Amar's view is that the right of the people to assemble and amend or revise the Constitution is in addition to that provided by Article V. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988).

350. Amar, *supra* note 333, at 1152-57.

of its drafting, the participants, scholars, and practitioners have debated over the meaning of the phrase. The dispute will not be resolved here.

The conflict is best framed by Justice Story. He decried the suggestion that the statement is intended to be absolute as the language sounds:

That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen. A man might . . . stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances.³⁵¹

Story equated the power to "accuse another of the most infamous crimes" with the printing of treasonous statements.³⁵² Story acknowledged that other commentators do not share his views. He suggested the alternative view provides that "every individual certainly has a right to speak, or publish his sentiments on the measures of government. To do this without restraint, control, *or fear of punishment for so doing*, is that which constitutes the genuine freedom of the press."³⁵³

Story looked to Blackstone for historical support that the evil identified in England was the licensing of newspapers, an evil that was eliminated when the printer's licensing act expired in 1694.³⁵⁴ This

351. 3 STORY, *supra* note 18, § 1874, at 731-32 (footnote omitted).

352. *Id.*

353. *Id.* § 1880, at 738-39.

354. *Id.* § 1876, at 734-35. Story explains:

The art of printing, soon after its introduction, (we are told,) was looked upon, as well in England, as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star Chamber; which limited the number of printers, and of presses, which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the long parliament of Charles the First, after their rupture with that prince, assumed the same powers, which the Star Chamber exercised, with respect to licensing books; and during the Commonwealth (such is human frailty, and the love of power, even in republics!) they issued their ordinances for that purpose, founded principally upon a Star Chamber decree, in 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force; but it was so

construction might well support the Blackstone-based approach that the First Amendment was designed to stop prior or previous restraint, but weakened the notion of absolute limitations on the government regarding the press. Both the majority and dissent in *Near v. Minnesota* quote Blackstone for support in fighting the evils of prior restraint.³⁵⁵ The majority quoted: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."³⁵⁶ The dissent quoted:

To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [of 1688], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.³⁵⁷

Story is unquestionably correct that, as part of its purpose, the clause was intended explicitly to eliminate the government's power to establish a licensing system. This was an evil well-known and successfully abolished in England. While this was an evil no one wished to reinstate in the United States, the phrase selected by the drafters is much longer than necessary to prohibit only the licensing of the press. Something more was intended, or at least alluded to. If a prohibition on licensure was the full extent of the clause, then Hamilton was correct that the right would not be enhanced by restating it.

Another issue with Story's approach—the implication that the mere elimination of licensure precludes previous restraint of an inciting, libelous work, or a work copyrighted by another party—has been historically proven false. There are many instances when a story can be identified before it goes to press and stopped.³⁵⁸ This may not

strongly resisted by parliament, that it expired in 1694, and has never since been revived.

Id. For a discussion of this act's limitation on copyright, see *supra* notes 143-145 and accompanying text.

355. 283 U.S. 697 (1931).

356. *Id.* at 713-14 (quoting 4 WILLIAM BLACKSTONE *151-52).

357. *Id.* at 733-34 (Butler, J., dissenting) (alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *152).

358. E.g., *United States v. Progressive, Inc.*, 467 F. Supp. 990, 993 (W.D. Wis. 1979) (seeking temporary and permanent injunctions on the publishing of nuclear bomb secrets). *Near* is inapplicable because in that case, the Court prohibited the state from declaring a particular newspaper a public nuisance. 283 U.S. at 723-24.

be done systematically, but the failure to catch every offense does not mean that the problem has been eliminated. Indeed, if this were the scope of the protection, numerous articles would now be written on the legality of using passive Internet surveillance techniques to anticipate the topics appearing in tomorrow's papers (or the websites updated five minutes from now). At a minimum, the protection must extend to prior restraint itself, rather than the licensing scheme that supported it. The Supreme Court recognized this component of the meaning in *Near* when it barred the State of Minnesota from closing a malicious gossip column as a public nuisance.³⁵⁹

The prior restraint in *Near* did not stem from an illegal licensing system, but rather from such a sufficiently robust record of slanderous and inciting material that it was found to be a public nuisance.³⁶⁰ Nonetheless, the Court recognized that the law could not allow an improper goal to be achieved by using a novel legal claim.³⁶¹

The real fear that Story had with an absolutist approach to the First Amendment is that he equated that reading with a ban on all regulation of speech. By writing so persuasively to his peers and the Court that the law was not absolute, Story also framed the scope of the law as covering statements regarding all speech, including defamatory speech about one's neighbors.³⁶²

Story suggested the wrong set of limitations that should have been placed on the Freedom of Speech clause of the First Amendment. His interpretation requires that the limit be on unreasonable limitations or that the clause extend only to prior restraint. This reading is not necessary. The freedom of speech and press that could not be abridged was the right to object to the government, orally and in print. The Constitution included this as part of the implicit Bill of Rights alluded to by Hamilton, namely the absolute protection for statements made in Congress and the definition of treason that required an overt act. Like the rights to petition and to assemble, speech and press could be

359. See *Near*, 283 U.S. at 711.

360. *Id.* at 706.

361. See *id.* at 707. Compare the Court's similar treatment of false light claims and claims for emotional distress as ways around the constitutional limitations on defamation. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (parody); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (false light privacy claim).

362. "That this amendment was intended to secure to every citizen an absolute right to speak . . . would be to allow every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen." 3 STORY, *supra* note 18, § 1874, at 731-32.

interpreted much more broadly, but this was not the fashion used when the provisions were drafted and were not expanded intentionally.

Again we return to the convergence of political and religious speech in the colonies. The primary libel cases were political cases or political/religious cases wherein the speaker was accused of sedition, libel, or heresy. These were political prosecutions for speech. The impact of censorship can be felt as heavily through fines as through licensure. It does not encourage freedom for the state to hold that it will refrain from stopping speech but will instead jail the speaker for distribution of a single copy of a statement. Imagine how much poorer we would be if Dr. King had been subject to civil or criminal liability if his vision of a colorblind God could result in heresy charges.³⁶³ Similarly, eliminating prior restraint on publishing "unauthorized" versions of the Bible provides little solace, if the printer finds his copies confiscated and himself in jail, following the initial distribution of those same copies. Without more, the elimination of prior restraint is an illusory protection that may result in an even more pernicious form of governmental control through the vagaries inherent in selective protection.

In the most common types of speech cases, those of defamation and those involving copyright, the actions are between private parties. The state is necessarily neutral. It has little interest in which of the two parties originated a book or a map, only that the rights among the citizens be fairly adjudicated. In most situations, the same is true in cases concerning slander and libel. In such cases, the freedom of speech is not implicated because it is outside the absolutely protected freedoms to criticize the government. If the person was acting in an official capacity, however, the absolute right would be invoked and no complaint could lie.

With the Supreme Court's decision in *New York Times Co. v. Sullivan*, the Court has moved us back in that direction.³⁶⁴ *Times v. Sullivan* represents the furthest an absolutist approach can go within the framework of the original First Amendment because it was a civil action applied to the states and involved a governmental employee suing on his own behalf. It ably illustrates where the absolutist line should have been drawn.

363. The seven arrests of Dr. King during the Montgomery protests were deemed libelous by plaintiffs in *N.Y. Times v. Sullivan* because the advertisement at issue did not state specifically who arrested Dr. King, but rather disputed the frequency or nature of the arrests. 376 U.S. 254, 258 (1964).

364. See *id.* at 280-81.

To be absolutely barred from governmental action, the speech must be of or concerning the government, its officers, or its administration.³⁶⁵ The advertisement at issue in the case involved the role of the police in the civil rights protests in Montgomery, Alabama, and therefore, it involved governmental action.³⁶⁶

The case applied the First Amendment to the states through the Fourteenth Amendment rather than through its own language.³⁶⁷ Madison had hoped for a broader statement, but the states were deemed to have sufficient protections of their own, and the First Amendment was not viewed as applying to the states when drafted.³⁶⁸ The First Amendment did not fully capture the essence of Madison's analysis until the adoption of the Fourteenth Amendment after the Civil War.³⁶⁹ Eventually, however, his more expansive vision was embodied in the Constitution as interpreted by the courts.

Finally, the case was applied to a civil action rather than a criminal action.³⁷⁰ The Court recognized the tremendous chilling effect even a civil action would have on the free press to criticize the government and chose to limit significantly the instances when an action could be brought.³⁷¹ The Court also skipped past the argument that the law applied only to state actions, not private suits, by pointing out that the discretion given to the jury included far broader damages than the state criminal fines would allow.³⁷² Whether the distinction between a personal claim and a civil claim in one's professional capacity had been made in 1779 is unclear. The distinction of *Times v. Sullivan* seems consistent with the fears of interference with the rights to speak and print.³⁷³ Thomas Jefferson, sometimes considered a strong advocate of the natural rights model of free speech, placed the

365. See *id.* at 265.

366. See *id.* at 260-61.

367. See *id.* at 265; *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the First Amendment to the states through the Fourteenth Amendment for the first time).

368. See *supra* Part IV.A.

369. See Amar, *supra* note 333, at 1137.

370. See *N.Y. Times*, 376 U.S. at 265.

371. See *id.* at 277.

372. See *id.* at 268-69.

373. The Court opined:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.

Id. at 265.

proviso as 'private injury.'³⁷⁴ It would seem too easy a subversion to avoid an absolute protection merely by claiming the injury was personal rather than professional.

Justice Black's concurrence captures this absolutist approach directly:

I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials [B]riefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers

....

The power of the United States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.³⁷⁵

Although the Court went very far to approximate the absolute nature of the First Amendment right, it still gave the plaintiff the power to allege and assert a claim for libel, which can lead to increased insurance costs for newspapers and some heightened caution in what is printed. As Justice Black points out, the costs may be incurred through the filing of multiple suits, nibbling the defendant to a slow death by ducks—motions, filings, and costly discovery. An absolutist approach would have barred an official from bringing a claim.³⁷⁶ Justice Black is

374. *Draft Constitution for Virginia* art. IV (June 1776), in THOMAS JEFFERSON, WRITINGS 344 (Merrill D. Peterson ed., 1984) ("Printing presses shall be free, except so far as by commission of private injury cause may be given of private action.").

375. *N.Y. Times*, 376 U.S. at 293, 295-96 (Black, J., concurring).

376. The protection of the jury trial was another critical component of the Constitution's implicit Bill of Rights. To the extent that a civil trial before a jury was required to find libel, in this case, Hamilton would probably have suggested that the government had

correct that the founders would have expected a different result. History, however, has rewritten our past.

C. *The Tradition of Censorship*

The First Amendment had little opportunity to be tested by the early courts. With the exception of the Sedition Act of 1798³⁷⁷ that never reached the Supreme Court, few attempts were made by Congress to legislate in this area initially.³⁷⁸ During this same period, censorship continued unabated. Neither Blackstone nor Story looked to the [Theatrical] Licensing Act of 1737 as embodying the same evil as that of press licensing, neither in degree nor in kind. The freedoms sought over speech and press simply did not extend to the theatre or mere entertainment.

In the realm of stage performance, fears of governmental or public tyranny were not voiced at the time of the drafting of the Constitution or for many years following it.³⁷⁹ The general attitude was that theatrical entertainments were an acceptable form of trade like most others, but perhaps in need of greater local control. As one court explained, there was

no objection to . . . admitting theatrical entertainments to be as meritorious as other occupations. But it seems to be peculiarly proper [to license and tax] employments of this kind. They require to be watched. Towns are put to expense in preserving order, and it is proper

been sufficiently limited and a jury finding for damages should have been sustained. Madison, however, was quite explicit that the danger was the power of the sovereign and in a nation "of the People" the sovereign majority must itself be limited. Jefferson, when advocating the natural right to speak, would have been likely to propound the "private" remedy for injury narrowly—certainly far from the official capacity that was at issue in *New York Times*. Nonetheless, this distinction is not dictated from the history of the First Amendment because participants themselves were unlikely to have had a common understanding as to the limits. But see LEVY, *supra* note 339, at 301-02 (suggesting that Jefferson, as president, was quick to use the courts to punish his political opponents). Perhaps the real point behind Jefferson's approach, then, is that the power of the government will be used, so it must be limited rather than trusted to good will.

377. Sedition Act of 1798, ch. 74, 1 Stat. 596, 596-97.

378. See LEVY, *supra* note 339, at 301-02. Claims for seditious libel were brought in Connecticut common law courts against newspapers in 1804 on behalf of the United States government for attacks on the government. See *id.*

379. *E.g.*, *Hodges v. Nashville*, 21 Tenn. (2 Hum.) 61, 67 (1840) ("The town of Nashville was incorporated by the act of 1806, ch. 33, in the 2d section of which, among other things, the power is given to the Corporation to provide for 'licensing, regulating, or restraining theatrical or other public amusements within the town.'"); *Carey v. Washington*, 5 D.C. (5 Cranch) 13 (1836)(No. 2404) (discussing the licensing of theatricals in 1810); *Wallace v. Usher*, 7 Ky. (1 Bibb) 508 (1817) (reviewing theatrical licensing law of 1811).

they should be indemnified for inconveniences or injuries occasioned by employments of this nature.³⁸⁰

I have not found any serious discussion suggesting that theatre and popular entertainment were worthy of the same type of protection as the press, assembly, or speech written during the time of the Revolutionary War or the constitutional debates. That is not to say that no such sentiments existed or that they were not proposed from time to time. One suggestion is that theatre was considered quintessentially English and as such strongly disfavored by the citizens of the newly formed nation.³⁸¹ Another is that the puritanical traditions of the colonies had embraced the English censorship laws.³⁸² Such laws were passed by the Continental Congress in 1774, as well as by a number of individual colonies.³⁸³ The political reality was that at the time the First Amendment was written it did not extend past the soap box to the professional stage.

The idea that stagecraft was a form of political and religious speech was not new to the nation. Colonial plays were carefully screened to protect against heretical content. In *The Republic*, Plato recognized the power and potential for evil inherent in staged performances.³⁸⁴ Plato strongly advocated controlling the words spoken on the stage because of the impact they had on the audience and the ability of the playwright to stir emotions and sway thoughts.³⁸⁵ He apologized to Homer and the other poets, but recognized that when done to tell an otherwise morally uplifting, religious story, the representation of bad characters or improper thoughts could affect the public, leading them to improper thoughts and deeds.³⁸⁶

The role of the stage regulators continued, moving increasingly towards the more puritanical than the political. Perhaps this was centered in a populist notion that even plays regarding politics should not be banned, but more likely it was centered on the nature of the American stage. With no copyright for playwrights and no official theatre like that of London, America simply was not producing

380. *Boston v. Schaffer*, 26 Mass. (1 Pick.) 415, 419 (1830).

381. See CAMBRIDGE GUIDE TO AMERICAN THEATRE 100 (Don B. Wilmeth & Tice L. Miller eds., 1993).

382. See *id.*

383. *Id.*

384. PLATO, *REPUBLIC* 71 (Tom Griffith trans., G.R.F. Ferrari ed., 2000) (Book III).

385. *Id.* at 76-78.

386. *Id.* at 78 ("No, he said, it would be quite wrong to praise this kind of behaviour. It's only my high opinion of Homer, I said, which stops me calling it impious to talk like this" (quotations omitted)).

significant playwrights. In New York, the theatre producers, controlled by the increasingly powerful Theatrical Syndicate from the late 1880s through the early part of the twentieth century, were reluctant to run afoul of political dislikes.³⁸⁷ On occasion, when more realistic plays were offered, the leading cast members would be arrested.³⁸⁸ Such arrests occurred against Clyde Fitch's *Sapho* in 1900, Arnold Daly's *Mrs. Warren's Profession* in 1905, and George Scarborough's *The Lure* in 1913.³⁸⁹ Mae West was arrested for her play *Sex* in the 1920s.³⁹⁰

In addition to the occasional arrest of an actor to discourage overly risqué or realistic plays, a few specific laws were enacted that explicitly transcended the prior restraint policies of the First Amendment. In 1873, the Comstock Laws were enacted to regulate the dissemination of birth control information.³⁹¹ By 1927, the Wales Padlock Act gave authorities the power to close theatres, to arrest actors, and to ban productions that were thought to be indecent.³⁹² Whatever the First Amendment meant to Madison, Hamilton, Jefferson, or Story, it did not have sufficient reach to bar the prior restraint of theatrical presentations.

D. *The Mutual Distaste for the Motion Picture*

At its inception, the motion picture was seen as an outgrowth of the theatre. Its New York origins were populated with the stars of the New York stage. The courts treated the transfer of dramatic rights to include both stage and film rights.³⁹³ Theatres often hung film screens to show one-reel and two-reel films between the live acts. As the child

387. See CAMBRIDGE GUIDE TO AMERICAN THEATRE, *supra* note 381, at 100.

388. *Id.*

389. *Id.*

390. *See id.*

391. See Comstock Act, ch. 258, 17 Stat. 598, 598-99 (1873) (codified as amended at 18 U.S.C. §§ 1461, 1465 (2000)) (barring dissemination of information on birth control); *Message Photo-Play Co. v. Bell*, 166 N.Y.S. 338 (1917) (upholding ban on film entitled "Birth Control" about the life of Margaret Sanger); see Barry Steinhardt, *The Communications Decency Act: Morally Necessary or Politics as Usual?*, 11 ST. JOHN'S J. LEGAL COMMENT. 727, 728 (1996); see generally Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449 (1996) (discussing the history and problems with censorship of speech and pornography).

392. Wales Padlock Act, ch. 690, 1927 N.Y. Law 1731 (repealed 1965) (creating a misdemeanor to present plays involving "sex degeneracy or sex perversion"); see Jewelle Gomez, *Do We Have a Chance Against the Far Right?*, 38 N.Y.L. SCH. L. REV. 195, 197 n.8 (1993).

393. See *Manners v. Morosco*, 252 U.S. 317, 326 (1920); *Harper Bros. v. Klaw*, 232 F. 609, 613 (S.D.N.Y. 1916).

of the stage, the legal privileges and rights of the new entertainment were circumscribed by that which had gone before. Because theatre was subject to censorship and outside First Amendment protection, motion pictures would be treated no differently.³⁹⁴ Just as dramatic performance by film had been considered a contractual extension of stage rights,³⁹⁵ so too were the laws regulating theatrical licensure extended to the motion picture industry without significant debate or comment.³⁹⁶

As early as 1897, a nickelodeon³⁹⁷ film of Fatima, a then-famous "cooch" dancer, "so offended some members of certain communities that exhibitors superimposed broad white stripes across the screen to cover the areas where Fatima displayed her most lascivious wares."³⁹⁸ The censors' bars were needed despite the rather heavy, embroidered costume she wore.

Regulation from within the industry continued. In both the United States and England, producers and exhibitors chose to self-regulate as a method of controlling the potentially more damaging censorship of the government. In England, for example, the British Board of Film Censors was founded in 1912.³⁹⁹ In the United States, self-censorship began in 1909 with the National Board of Review of Motion Pictures, a board of laypersons dedicated to preventing obscenity from being distributed, better organizing the blockades against the Fatima and the cooch dancers.⁴⁰⁰

The Motion Picture Producers and Distributors of America undertook a series of actions that culminated in 1930 with the Production Code. The organization's president, Will Hays, became the czar of American morality as the Hays Office regulated the morality of production for Hollywood.⁴⁰¹

394. See Comment, *supra* note 319, at 90. This 1939 comment on film censorship lays much of the blame on English theatrical censorship. Without the theatrical regulations of England, the "pulpit, press, and play would today be on a footing of equality." *Id.* at 89 (quoting JOHN L. PALMER, *THE CENSOR AND THE THEATRES* 20 (1913)).

395. See *supra* Part III.D.

396. See Comment, *supra* note 319, at 90.

397. A nickelodeon is "[a] makeshift motion picture theater, often a converted store, which proliferated all over the U.S. during the first decade of the century. Nickelodeons were so called because they charged a nickel (five cents) for admission." See KATZ, *supra* note 9, at 859.

398. See MAST, *supra* note 252, at 105.

399. LESLIE HALLIWELL, *THE FILMGOER'S COMPANION* 125 (7th ed. 1979).

400. See Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer v. Kramer*, 24 *LEGAL STUD. F.* 221, 226 n.18 (2000).

401. See HALLIWELL, *supra* note 399, at 306.

Self-regulation served to blunt but not to eliminate governmental regulation. As the dominant economic force in entertainment, the motion picture industry again led the way. As one commentator put it, "[m]otion pictures were the first significant form of electronic media. They were also the first [electronic media] to be subject to censorship."⁴⁰² By 1912, three states and many cities had censorship laws designed to review the content of film.⁴⁰³ Unlike the more difficult task of censoring a play without seeing the entire production, censoring a film was relatively easy; the film was previewed before the review board.⁴⁰⁴ Typically, the board would approve, disapprove, or demand that certain changes in the form of cuts to the film were made as a condition of approval.

The impact of the reviews was exacerbated by the differing standards and tastes among cities and states. The same film might be approved in New York but ordered changed in Virginia. The national distributors of films would work to ensure that a film met the least possible resistance because any violation could result in a significant disruption of the distribution agreements for the film throughout the country. One role of private censorship was to anticipate the most restrictive local or state censorship to protect the distributor from having a film be subsequently deemed inappropriate.⁴⁰⁵

The Supreme Court had an opportunity to review the situation in 1915. In *Mutual Film Corp. v. Industrial Commission*, the Ohio censorship statute was challenged by a filmmaker on both interstate commerce and free speech grounds.⁴⁰⁶ The Ohio statute represented the general censorship approach of the era. "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."⁴⁰⁷ The interstate commerce argument was, in many ways, the more practical of the two arguments. Films were admittedly shipped in interstate commerce; the exhibitors often owned or were members of consortia that crossed state lines. Interstate

402. Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1142 (1996).

403. See Comment, *supra* note 319, at 91, 97.

404. *E.g.*, *Mut. Film Corp. v. Indus. Comm'n.*, 236 U.S. 230, 240 (1915), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

405. See Comment, *supra* note 319, at 100-01. Despite this, the author of this comment suggests that voluntary review is far better than censorship and prior restraint. See *id.* at 102.

406. 236 U.S. at 239.

407. *Id.* at 240.

commerce was a justiciable issue for the federal courts.⁴⁰⁸ The Court's dismissal of the claim, however terse, was at least based on the merits of the claim and its conclusion that so long as the board only reviewed films exhibited or displayed in Ohio, there was no concern regarding the censorship's effect.⁴⁰⁹ In light of the tradition of entertainment censorship, this approach is not remarkable, although it strains to avoid the realities of film distribution.⁴¹⁰

*The Mutual*⁴¹¹ also argued that its free speech rights were violated under both the state⁴¹² and federal constitutions, with the federal Constitution applying pursuant to the Fourteenth Amendment but the district court had properly rejected the argument.⁴¹³ As such, the Court could easily have sidestepped the issue of the First Amendment, because it was not properly before the Court. By its own interpretation of the Fourteenth Amendment, the Court was powerless to adjudicate the state and federal free speech rights at issue in the claim.⁴¹⁴

At the Supreme Court, *The Mutual* first made the argument that the statute interfered with interstate commerce, but this claim was dismissed because the board's review was limited to films exhibited or displayed in Ohio.⁴¹⁵ More importantly, *The Mutual* challenged the law as a form of restraint of free speech, placing before the Court a question as to whether the law violated the prohibition that "no law may be passed 'to restrain the liberty of speech or of the press'"

408. See *id.* at 240.

409. *Id.* at 240.

410. Cf. *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding that exhibitions of baseball are purely state affairs and not subject to federal antitrust legislation).

411. "The Mutual" was the term commonly used for the company and the case. See John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 159 (1993).

412. The Ohio Constitution also has a strong free speech clause:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

OHIO CONST. art. I, § 11.

413. See *Mut. Film Corp. v. Indus. Comm'n*, 215 F. 138, 141 (N.D. Ohio 1914), *aff'd*, 236 U.S. 230 (1915), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The Supreme Court applied the First Amendment to the states in 1925. See *Gitlow v. New York*, 268 U.S. 652 (1925).

414. *Mut. Film Corp.*, 236 U.S. at 243.

415. See *id.* at 239-40.

provided in the Ohio Constitution.⁴¹⁶ The Court reviewed the issue by questioning whether films fell within the range of activities included in "speech, writing or printing" that, the Court conceded, were immune from the type of censorship in question:

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theatre, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press,—made the same agencies of civil liberty.

....

... We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns . . . and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention.⁴¹⁷

The unanimous Court upheld the judiciary's common sense, reaching past the limits of the Constitution to uphold censorship under both state and federal constitutional law. Although many of the justices later had a change of heart,⁴¹⁸ the proposition that films could be subject to prior censorship lasted until 1948, and the *Mutual Film* opinion itself was not actually overturned until 1952.⁴¹⁹ The law was quite settled at the time.

The first significance of the Court's handling of *The Mutual* was an opportunity to advance the idea that theatre, film, and amusements were within the scope of the First Amendment.⁴²⁰ The second significance was to promote the use of censorship against motion

416. *Id.* at 242 (quoting OHIO CONST., art. I, § 11).

417. *Id.* at 243-44; see DONALD E. LIVELY, MODERN COMMUNICATIONS LAW 9 (1991).

418. Wertheimer, *supra* note 411, at 161. ("Years later, Oliver Wendell Holmes, Jr., was said to have expressed regret for ever having signed his name to the *Mutual Film* opinion."). Ironically, the opinion was well founded on legal precedent. Perhaps the best judicial defense of the case was that Justice Brandeis was not yet on the Court, so it had yet to find its conscience.

419. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); LIVELY, *supra* note 417, at 9.

420. See *Mut. Film Corp.*, 236 U.S. at 244 (discussing cases upholding regulations of both theatrical and film censorship and licensing). "It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved." *Id.*

pictures by the state and federal governments.⁴²¹ Within a year of the decision, new statutes were adopted to ratify and to strengthen the power to censor granted by the Court.⁴²²

It may be worth noting this was not a particularly good period for other aspects of the First Amendment. The Espionage Act was adopted in 1917 for purposes of protecting the United States from its enemies during World War I.⁴²³ The Supreme Court upheld convictions for publication of treasonous statements.⁴²⁴ Justice Holmes wrote that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."⁴²⁵ Like the decision in *The Mutual*, however, the Court paid little attention to its own limitations, requiring that no more overt an act than the printing of the document was necessary for criminal liability.⁴²⁶ The pamphleting became the necessary overt act as similar "conduct" was criminalized.⁴²⁷ Perhaps these cases represent the best argument for an absolutist approach to political speech, that we must defend ourselves against human nature in times of stress by erecting absolute barriers to ensure that which we hold dear is not destroyed in an effort to protect it.⁴²⁸

Of course, the clear and present danger test has been repudiated. As the Court has explained, "the constitutional guarantees of free

421. *Id.* at 244-45.

422. *E.g.*, 18 U.S.C. § 1462 (2000) (criminalizing and banning importation of "any obscene, lewd, lascivious, or filthy . . . motion-picture film"); Act of Sept. 21, 1922, ch. 356, § 1453, 42 Stat. 858, 920, *repealed by* Act of June 17, 1930, ch. 497, § 651(a)(1), 46 Stat. 590, 762 ("[A]ll photographic-films imported . . . shall be subject to such censorship as may be imposed by the Secretary of the Treasury"); Act of June 5, 1920, ch. 268, 41 Stat. 1060, 1060-61 (prohibiting interstate transportation of "any obscene, lewd, or lascivious, or any filthy" film); Act of Oct. 3, 1913, ch. 16, § 380, 38 Stat. 114, 151 (same); Act of Mar. 4, 1909, ch. 321, § 245, 35 Stat. 1088, 1138; *see also* Comment, *supra* note 319, at 93-97, 102 (collecting federal, state, and local regulations used to censor or criminalize immoral content in motion pictures).

423. *See* Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917).

424. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919).

425. *Id.* at 52.

426. *See id.* So much for the court of time overturning the Sedition Act.

427. *See also* *Schaefer v. United States*, 251 U.S. 466, 468 (1920) (upholding conspiracy convictions using circulation of pamphlets as overt acts); *Abrams v. United States*, 250 U.S. 616, 617 (1919) (same); *Stilson v. United States*, 250 U.S. 583, 585 (1919); *Debs v. United States*, 249 U.S. 211 (1919) (same); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). This approach was also cited in *Whitney v. California*, 274 U.S. 357 (1927), in which a conviction for membership in the Communist Party was upheld.

428. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 514 (1985).

speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴²⁹ Much is made of this new formulation, yet the phrases "clear and present danger" or "producing imminent lawless action" do not ring as discordantly as the Court would have us believe. As Justice Douglas pointed out when concurring in *Brandenburg v. Ohio*, the Court had applied the more modern test in *United States v. O'Brien* only to convict a protester for burning a draft card.⁴³⁰ The Court upheld that conviction because "legislation to insure the continuing availability of issued [military registration and eligibility] certificates serves a legitimate and substantial purpose in the system's administration."⁴³¹ But as Douglas notes, the conviction was not for failing to proffer the defendant's card when lawfully obligated to do so, it was for the political act of burning it in protest, an act less overt than most of the Espionage Act convictions the Court proudly overturned.⁴³²

The application of the seemingly benign *Brandenburg* test illustrates the problems of balancing applied by the courts. Like the *almost* absolute nature of *Times v. Sullivan*, the *almost* overt act of the imminent lawless action test left a wide range of political speech unprotected by the First Amendment.⁴³³

E. *The Broadening of Speech and the Narrowing of Protection*

During the twenty years following *The Mutual*, the nature of the country changed dramatically in terms of its technology, social economy, and politics. Increasingly, the voice of Justice Brandeis spoke out for greater personal freedoms in privacy and speech. The success of winning two wars may have reduced the fear that a pamphleteer could reverse our way of life. Nonetheless, the threat of Germany was replaced with a fear of Soviet Russia and Communism.

429. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that a state may not punish threatening speech unless the speech is directed to incite imminent lawless action and is likely to incite such action)

430. *See id.* at 454-55 (Douglas, J., concurring); *United States v. O'Brien*, 391 U.S. 367, 382 (1968).

431. *Brandenburg*, 395 U.S. at 455 (Douglas, J., concurring) (quoting *O'Brien*, 391 U.S. at 377-78).

432. *Id.* (Douglas, J., concurring).

433. If the constitutional barriers against governmental oppression only apply in times of peace when there is little tension or debate, perhaps the barriers are set too low. *Cf. Blasi, supra* note 428, at 464 (discussing developments that affect the level of tolerance).

The novelty of silent pictures gave way to the central cultural role that films had taken in American entertainment and the importance of the newsreel in sharing the pictures and propaganda of the war effort.

During the 1930s, states like New York were recognizing the difficulties of *The Mutual* decision on free speech protections. Some states began to exempt newsreels or "current events" films from the censorship laws.⁴³⁴ The standard for review also began to change. The Second Circuit ruled in 1934 that the work, taken in its entirety, had to be judged violative of the statute to have a license denied.⁴³⁵ This standard, of course, seems more familiar to *Roth v. United States*⁴³⁶ and its reformulation in the *Miller* test,⁴³⁷ but the origins of requiring that a work be treated as a whole began much earlier. In 1931, the Court declared that, at least regarding prior restraint, a near absolutist approach was appropriate to protect the press.⁴³⁸

Still, despite these improvements, the state regulation of film continued. Not until 1948 did the Supreme Court finally acknowledge that films were entitled to some measure of First Amendment protection, and even that protection was far less than the level suggested by *Near v. Minnesota*.⁴³⁹ *The Mutual* was never mentioned by the Court in the opinion.

The Court, however, was forced to deal squarely with the repudiation of film censorship in *Joseph Burstyn, Inc. v. Wilson*.⁴⁴⁰ Interestingly from a First Amendment perspective, the film *The Miracle* had been banned as sacrilegious.⁴⁴¹ For the first time, the Court admitted it could not create separate standards based on whether a work was merely entertainment.⁴⁴² "The line between the informing

434. See Comment, *supra* note 319, at 93.

435. *United States v. One Book Entitled Ulysses* by James Joyce, 72 F.2d 705 (2d Cir. 1934); see Comment, *supra* note 319, at 93 & n.39.

436. 354 U.S. 476, 485 (1957); see also *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney Gen., 383 U.S. 413, 418 (1966) (applying the *Roth* test).

437. *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.")

438. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

439. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.") Despite this sweeping language, the Court was merely reviewing the ability to apply antitrust laws to the studios, divesting the film companies of their ownership in the theaters throughout the country. The Court saw no First Amendment issues that stripped the filmmakers of their exhibitor ownership.

440. 343 U.S. 495, 498 (1952).

441. See *id.*

442. See *id.* at 501. As the Court explained:

and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."⁴⁴³

The Court also addressed the danger of pernicious immorality that the *Mutual* Court identified could come from baseless entertainments such as film.⁴⁴⁴ Admitting that film had the capacity to promote immoral conduct through propaganda and persuasion, the Court nonetheless rejected the threat of evil as sufficient to allow for censorship.⁴⁴⁵ Instead, the *Burstyn* Court anticipated another of the *Miller* test prongs by stating that the "capacity for evil . . . may be relevant in determining the permissible scope of community control."⁴⁴⁶

The tendency is to herald the *Burstyn* decision as a tremendous step in granting broad First Amendment protection to all forms of speech. But, because the *Paramount* Court had admitted that distinctions based on the film medium were already gone, *Burstyn* was attempting to do something else. The concurrence by Justice Reed points out that the opinion, though laudatory of film and recognizing its speech role, failed to ban the practice of censorship or licensing.⁴⁴⁷

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.

Id.

443. *Id.* (alteration in original) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

444. The Court explained:

[Films] may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences.

Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 242 (1915), *overruled by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

445. *Joseph Burstyn*, 343 U.S. at 502.

446. *Id.*

447. Justice Reed states:

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to

Had Justice Story been correct about the meaning of the First Amendment, then the primary purpose of the *Burstyn* decision should have been to eliminate the licensing practices for film just as they had been banned in 1694 for the English press. The failure of the Court to take this seemingly modest additional step results in detailed discussions about the meaning of the word "sacrilegious" (even though the other provisions of the First Amendment should clearly have eliminated any right of a government official to regulate such public statements) as well as a continuous stream of litigation regarding the scope of the censor's powers.

Ironically, then, of the two cases on film and the First Amendment, the *Burstyn* decision was far weaker than *The Mutual*, despite the outcomes of the two cases. *Burstyn* and the cases which have followed continued to struggle with the central meaning of the First Amendment in large part because it no longer had a central meaning. Hamilton's comments regarding speech and press may indeed have been proven right:

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude of evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.⁴⁴⁸

New York was again before the Supreme Court seven years later. This time the claim was the immorality of *Lady Chatterly's Lover*.⁴⁴⁹ Finding three isolated scenes in the film immoral, the licensing board refused to issue a license until the scenes in question were deleted.⁴⁵⁰ Again, the Supreme Court reversed.⁴⁵¹

Without dwelling on the Court's admonition that works be taken as a whole, the decision of the Court again diluted the First Amendment protection, not only for films but for all forms of speech. The Court refused to address the meaningful issues of the case:

me to be of a character that the First Amendment permits a state to exclude from public view.

Id. at 506-07 (Reed, J., concurring).

448. THE FEDERALIST No. 84, at 535 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

449. *Kingsley Int'l Pictures Corp. v. Regents of the Univ.*, 360 U.S. 684, 685 (1959).

450. *See id.*

451. *See id.* at 690.

Specifically, there is no occasion to consider the appellant's contention that the State is entirely without power to require films of any kind to be licensed prior to their exhibition. Nor need we here determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for newspapers, books, or individual speech. It is enough for the present case to reaffirm that motion pictures are within the First and Fourteenth Amendments' basic protection.⁴⁵²

Rather than clarifying the role of the First Amendment or supporting it, the Court continued to encourage New York and other jurisdictions to exert some police powers over films and other forms of speech. Even as the Court has expanded the type of speech covered by the First Amendment,⁴⁵³ it has softened the fundamental principles at the heart of the First Amendment.⁴⁵⁴

This is not to suggest that the Court has made all the decisions incorrectly. Instead, the problem is the ambiguity that the expansion of speech has created for the courts, legislatures, and the public. For a good example, look to the rock musical *Hair*. *Hair*, a strongly political satire of the Vietnam era, was very explicit and politically charged. Not surprisingly, it sometimes faced opposition in finding theatrical venues for its touring productions. Having been denied a permit to use the Chattanooga Memorial Auditorium in Tennessee, the production company sued and lost in federal district court.⁴⁵⁵ Because the production included nudity and simulated sex, the lower court determined it would violate city ordinances and state law.⁴⁵⁶ "This criminal conduct, the court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection."⁴⁵⁷

With an irony lost on the Court (if not to the producers of the play), the Court quoted *Burstyn* for a strong statement of First Amendment protection: "The basic principles of freedom of speech

452. *Id.* at 689-90 (footnotes omitted).

453. By the time of *Kingsley*, the Court had already decided *Roth*. The Court added commercial speech in 1976. See *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

454. See also *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (invalidating the licensing scheme as a form of prior restraint but refusing to extend *Near v. Minnesota* to film).

455. *Southeastern Promotions, Inc. v. Conrad*, 341 F. Supp. 465 (E.D. Tenn. 1972), *aff'd*, 486 F.2d 894 (6th Cir. 1973), *rev'd*, 420 U.S. 546 (1975).

456. *Id.* at 476.

457. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 551-52 (1975).

and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.⁴⁴⁸ The Court points to the procedural safeguards to assuage its guilt that it has allowed censors a free hand, one that only gets lightly slapped after the fact.

The Court implemented its three-pronged test for a prior restraint to remain enforceable:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.⁴⁴⁹

While each of these three elements is necessary for prior restraint, a better test would be whether the presentation of the material would result in an overt act sufficient to commit a crime (such as treason) unrelated to the speech. Perhaps such a test could ban the publication of troop locations on the eve of a military strike while leaving the government out of most prior licensing.

The only imminent threat suggested by the cases is that of information so sensitive that no postpublication remedy can put the genie back into the bottle.⁴⁵⁰ For virtually everything else, the civil and criminal system are more than sufficient to chill the extreme speech at the margins. Unfortunately, one of the side effects of protection for the entertainment industry has been to foreclose the opportunity of the Court to return to any of the absolutist notions of the First Amendment. Even the absolute protection from prior restraint for the press that predated the American Revolution today seems beyond America's regulatory grasp.

Freedom from prior restraint of political speech, however defined, is similarly precluded. Even if society could make the distinctions that

448. *Id.* at 558 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

449. *Id.* at 560; see *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

450. Assuming that truly obscene and violent images are psychologically traumatizing, even a single inappropriate showing can harm a child (or adult) if it is sufficiently horrific. While this is probably true, I think the balancing of harms is misplaced. To protect against this theoretical harm, we allow for a system of prior review and policing for certain published materials, typically pornographic films. Yet there seems no evidence that the damage to the public is noticeably different in those jurisdictions that have opted not to install licensing boards over those that have continued to support a licensing regime. Given decades to test the effectiveness of licensing, perhaps it is time to declare that even the most modest costs in time and money caused by the remaining licensing schemes are burdens that can no longer be justified against such a broad, ill-defined evil.

some film censors had made in the thirties to treat contemporaneous news (like newsreels) as a form of press rather than entertainment, the blurred line between documentary and recreation would make any such effort fail.⁴⁶¹ Only if we could impose a First Amendment regime that allowed for no prior restraint and no criminal or civil liability for statements made about the government, including public officials, could we approach such a model. While this might still be less than what Madison had in mind, it remains an improvement over *Times v. Sullivan* and the cases refusing to bar prior restraint of motion pictures.

F. *Entertainment's First Amendment—The Ratings Game*

One legacy of *Burstyn* has been to overturn the Theatrical Licensing Act of 1737 as it has been transformed in the United States for regulation of the stage.⁴⁶² Another is to broaden the concept of free speech to virtually all media. For free speech advocates, this secondary effect should be heralded as a fundamental success for the entertainment industry.

The acceptance of the entertainment industry into the realm of the First Amendment, however, has come at a considerable price. Primarily, the price has been paid by the public in terms of the entertainment products available.⁴⁶³ To blunt the growth of government-sponsored censorship, the motion picture industry organized itself very early to provide censorship of its own. This collaboration was, and remains, an excellent opportunity for an industry that often strays into the illegal realm of antitrust violations to collaborate with the encouragement of Congress. Put another way, the offer of self-regulation by the film companies has resulted in very

461. Examples of such films include *Ali*, *Boys Don't Cry*, *The Perfect Storm*, and *The Insider*, as well as more historical films, including *Schindler's List*, *Roots*, and *Amistad*.

462. This protection does not extend to all stage performances, however, and the Court continues to allow for regulations requiring pasties and G-strings for nude dancing because the G-string evidently provides a prophylactic barrier to the secondary effects of erotic entertainment in local communities. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292-93 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570-71 (1991). Perhaps this was the imminent lawless action conceived of by the Court in *Brandenburg*.

463. As this is a law review article, I am avoiding any sociological discussion as to the reasons the United States seems to encourage an almost unlimited amount of violent content in its unregulated literature while remaining rather puritanical (if not prudish) regarding nudity. While I suggest in this Part of the Article that some of this is the direct result of the so-called voluntary ratings system, such an analysis obviously misses the social and political forces that shaped the ratings themselves, and as such it would be naive and unfair to lay the blame on the Hays Commission or the Motion Picture Association of America (MPAA). Instead, I merely suggest that the ratings system exaggerated the concerns of certain vocal minorities, allowing for the standards to be set in a nonrepresentative fashion.

standardized offerings and significant concerted activities. Congress and the public has apparently accepted this bargain without really assessing its consequences.

1. The Early Years

From the inception of the film era, concerns were raised regarding the licentious, immoral tone films sometimes took. It was the exhibitors that censored *Fatima* in 1897 by covering her fully clothed chest and groin with censorship stripes.⁴⁶⁴ Early censorship was available through the theatre's licensing board, which regulated the stage performances and required licenses to operate. As such, the theatres and exhibitors took steps to ensure that they were not closed by paying close attention to the citizens' groups that objected to particular films.

Early film censorship was highly fragmented. Without a central organizing body, the exhibitors, the distribution exchanges, and the film producers were at odds with each other. Silent films were often shown as acts in variety entertainments, so the local theatrical licensing board had jurisdiction to throw a movie out or to ban it from being shown.

Internally, the move to control the content of the films was a smaller component of the attempts to control the industry. In 1908, Thomas Edison joined with the two other companies he had been fighting in court over motion picture patents, the American Mutoscope and Biograph Company.⁴⁶⁵ They formed the Motion Picture Patents Company, entered into an exclusive license with Eastman to control all film stock, and set out to monopolize all motion picture production in the United States.⁴⁶⁶ The Patents Company, or "the Trust" as it was known, sought to control all film production, charging licensing fees for the uses of the cameras and projectors patented by members of the Trust.⁴⁶⁷ To bolster the value of their movies (which were not as successful in the marketplace as their competition from Universal or The Mutual), the Trust gave a seal of approval for its films. Edison's pictures were of wholesome entertainment.

The Trust was not the only group trying to censor the content of motion pictures. Often, citizen panels were formed by the clergy in

464. See MAST, *supra* note 252, at 105.

465. See NEAL GABLER, AN EMPIRE OF THEIR OWN 58 (1988).

466. *Id.* at 57-58; see Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 506-07 (1917).

467. See Motion Picture Patents Co., 243 U.S. at 507-08.

communities motivated by hedonistic movies that were produced by heathens in Hollywood. The founder of Universal, Carl Laemmle, and many of the filmmakers fighting the trust in Hollywood, were first- or second-generation Jewish immigrants. In addition to Laemmle, these producers included Louis Mayer, Samuel Goldwyn, Adolph Zucker, Jack Warner, William Fox, Harry Cohn, and many others.⁴⁶⁸ The result was that the non-Trust films tended to come from Jewish producers, with a few films from Irish and Catholic producers as well.⁴⁶⁹ The Trust used this as part of its campaign against the competition. "Behind the censorship drives of some of these organizations lay a thinly veiled antisemitism . . ."⁴⁷⁰ This was not a secondary effect of the drive to promote film censorship. Movies being made by new immigrants, particularly Jews, were inherently suspect. The anti-Semitism was not thinly veiled.

Nonetheless, the effect of the censorship was sporadic and random. When the Supreme Court ruled against the Trust in 1917, finding that it was an illegal monopoly using its patent to promote its motion pictures illegally, the first phase in organized motion picture self-censorship came to an end.⁴⁷¹

The end of the Trust's censorship did not end the public demand for control over this rapidly growing industry. The demise of the Trust left a vacuum to be filled. Further, problems related to drug abuse by actors, the divorce and quick remarriage of Mary Pickford, and the notorious trial of Fatty Arbuckle for the death of a young woman at a party led to increased demands that something be done about Hollywood.⁴⁷²

2. The Hays Office and the Production Code

Taking their cue from the baseball scandal involving the Chicago White Sox, the film producers decided that the best antidote for their Jewish, immoral product was a commissioner of film who was beyond reproach. The choice was Will Hays, former postmaster general of the United States.⁴⁷³ Hays had most recently served as President Harding's

468. See GABLER, *supra* note 465, at 2-3.

469. See *id.* at 59.

470. See MAST, *supra* note 252, at 105.

471. *Motion Picture Patents Co.*, 243 U.S. at 510.

472. See MAST, *supra* note 252, at 106. Arbuckle was finally acquitted after three trials, but never successfully returned to acting because of threats of boycotts of his films. See *id.*

473. See *id.* at 107.

campaign manager.⁴⁷⁴ As a Republican and a Presbyterian elder, he represented the perfect image for the Jewish film industry.⁴⁷⁵ Hays was elected president of the Motion Picture Producers and Distributors of America.⁴⁷⁶ The members were the major studios, Columbia (now Sony), Metro-Goldwyn-Mayer, Paramount, RKO (now also owned by Paramount's parent company Viacom), Twentieth Century-Fox, United Artists, Universal, and Warner Bros.⁴⁷⁷ With the addition of Disney and the merger of United Artists into Metro-Goldwyn-Mayer, the list has remained essentially unchanged.⁴⁷⁸

The Hays Office, as the organization was generally known, undertook to clean up the image of the film industry. Initially, this was a rather ad hoc process of reviewing movies and clearing them for distribution, with a healthy dose of public relations thrown in at every step. By 1927, however, the Hays Office began to formalize its practices. In 1927, the Hays Office promulgated the Production Code, an official document outlining the principles of film production for approved films in the United States.⁴⁷⁹

The timing could not have been worse. The Production Code and the formal process for "voluntarily" regulating filmmaking was approved in 1930, just as the Depression began to eat away at audience attendance.⁴⁸⁰ The producers responded to the social conflict and falling attendance with "films of questionable decency."⁴⁸¹ In addition, talking pictures increased the costs of production, and social groups were demanding more wholesome entertainment.

A particularly powerful lobbying group, the Legion of Decency, a Catholic organization, began a drive to create a boycott of films they did not deem appropriate.⁴⁸² The message of religious tolerance among minority religions that Madison had hoped for seemed lost. "It is only because they [the Hollywood Jews] are outside the moral sphere of American culture that they blunder so badly that they require periodic campaigns such as that of the Legion of Decency [a Catholic reform group] to set them right."⁴⁸³ The Hays Office responded by creating

474. *Id.*

475. *Id.*

476. *Id.*

477. Comment, *supra* note 319, at 103 n.95.

478. See MOTION PICTURE ASS'N OF AM., available at <http://www.mppaa.org/about/content.htm> (last visited Oct. 18, 2001).

479. See MAST, *supra* note 252, at 107-08, 134.

480. See Comment, *supra* note 319, at 104.

481. *Id.*

482. *Id.*

483. GABLER, *supra* note 465, at 2 (alterations in original).

"Class C" films, films forbidden to be viewed by Catholics by the Legion of Decency or Catholic leaders. Because the goal of the Hays Office was to ensure that the Catholic boycott did not hurt production or the image of the filmmakers, the creation of the Class C classification meant that no member studio could produce or distribute such a film.⁴⁸⁴ Only foreign imports were banned through the work of the Legion of Decency because the Production Code effectively eliminated any production of films that might even come close to resulting in the Legion's objections.

One particular example illustrates the impact of the Production Code's impact on the quality and nature of film production in the United States during the 1930s. In 1936, George Bernard Shaw's *St. Joan* was under development as an American motion picture.⁴⁸⁵ The history of Joan of Arc had previously been the subject of a substantial, detailed, and historical retelling by America's own Mark Twain, released to mixed reviews and tremendous sales. Nonetheless, despite eleven years on stage and millions of copies of a book on the subject in circulation, Shaw's *St. Joan* was deemed a violation of the Production Code because of certain, anti-Catholic sentiments.⁴⁸⁶

It may be asked how a Catholic censorship can possibly hurt me, as Saint Joan was hailed by all instructed Catholics as a very unexpected first installment of justice to the Church from Protestant quarters As I thought that the Hays Organization represented unsectarian American decency, I never dreamt that Saint Joan had anything to fear from it. Conceive my amazement when I found that the censorship of the Hays Organization includes that of a body called the Catholic Action, professing, on what authority I know not, to be a Roman Catholic doctrinal censorship.⁴⁸⁷

Shaw then explains some of the particular changes demanded of the play:

In the play it is necessarily explained that the Church must not take life. It could excommunicate Joan and hand her over to the secular arm, but it could not under any circumstances kill her. The Catholic Action is unaware of the existence of any such scruple. It prescribes the

484. See Comment, *supra* note 319, at 104.

485. See George Bernard Shaw, *Saint Joan Banned: Film Censorship in the United States*, London Mercury XXXVI, Oct. 1936, reprinted in SHAW ON THEATRE 244 (E.J. West ed., 1958).

486. See *id.*

487. *Id.*

following correction. The Bishop must not say "the Church cannot take life." He must say "The Church does not wish death."⁴⁸⁸

Shaw's letter also describes a number of similar line changes that presumably turn the play into a less objectionable piece of literature.⁴⁸⁹ The purpose of this example is not to vilify the Catholic Action, the Jewish producers, or even the Production Code. The example serves to illustrate graphically the problems of the Production Code and the alleged benefits of voluntary censorship. Choices were made on a line-by-line analysis of each script produced and each film completed. The single person in charge of the Production Code essentially dictated the morality and sensibility of the entire nation.

The Hays Office established a comprehensive process of prior review of source material to ensure that plays and novels were acceptable before they were purchased as the subjects for future films. The Production Code banned scenes, such as a man and women sharing a bed (even if married); topics such as promiscuity, brutality, or pleasant depictions of immorality; and words ranging from "God" and "sex" to "guts," "nuts," "nerts," and "louse."⁴⁹⁰ Hays Office members were fined as much as \$25,000 for violating the Code. These exacting rules and fines applied to every major studio and distributor in the United States. With detailed constraints and complete participation, there is no doubt that the films produced were more highly scrutinized than any governmental regulation could have created.

The pernicious danger of the Production Code was the illusion of free speech it created. So long as all the members of the cartel abided by the Production Code, no threat existed that a competitor would produce films that could prove popular because they were outside the Production Code. Neither erotic films nor politically challenging projects could be contemplated. Indeed, the Production Code had written in its opening paragraph that "theatrical motion pictures . . . are primarily to be regarded as *Entertainment*."⁴⁹¹

488. *Id.* at 245.

489. *Id.* at 245-46. Shaw, for example, was told to remove the scene in which Joan was threatened with the rack at her heresy trial "not because it is not true, but because it is 'essentially damaging.'" *Id.* at 246.

490. See MAST, *supra* note 252, at 226.

491. Comment, *supra* note 319, at 104. A summary of the essential Production Code principles provided the following:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience should never be thrown to the side of crime, wrongdoing, evil or sin.
2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.

The greatest problem of the Production Code was its success. Although it has been significantly modified in response to the concerns that only Will Hays and a few deputies dictated the tastes and morality for the entire company, the reality is that the current Motion Picture Association of America (MPAA) has not significantly modified the effects of this system to this day.

According to the MPAA website, this tradition remains solid. As the MPAA proudly announces on its website:

[F]ounded in 1922 as the trade association of the American film industry, the MPAA has broadened its mandate over the years to reflect the diversity of an expanding industry. The initial task assigned to the association was to stem the waves of criticism of American movies, then silent, while sometimes rambunctious and rowdy, and to restore a more favorable public image for the motion picture business.⁴⁹²

The success of the Production Code existed before the films were granted protection by free speech. It was designed as a fence around a fence, crafted to ensure that Hollywood films were not censored by the governmental review boards out of fear of the negative press that would ensue and of the difficulties a finding of immorality would have on the already negotiated distribution agreements. As such, it resulted in far greater censorship than would have been required by the government, probably more stringent than would have been tolerated by the public of its elected officials. But as a voluntary activity, it was not in the interest of the filmmakers, distributors, exhibitors, or government officials to complain.

Had the motion picture not engaged in such a fevered battle to protect its public image from legitimate criticism, the Hays Office would never have been needed. Whether the decision to join the Hays Office was the correct decision is impossible to tell. Eighty years later, it is unfair to second-guess the decision that allowed the senior heads of the Hollywood production establishment to hand over the button for the green light to a political fundraiser and former postmaster general.

Perhaps without the First Amendment as a safeguard, there was legitimate concern that the studios themselves could be shuttered or the presidents of the studios jailed and fined personally for the films distributed by their companies that various cities or states deemed

3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.

Id.

492. MOTION PICTURE ASSOCIATION OF AMERICA, available at <http://www.mpa.org/about/content/htm> (last visited Oct. 18, 2001).

indecent. Perhaps the overwhelming wave of anti-Semitism that swept America prior to its entry into World War II threatened the very existence of Jewish Hollywood.⁴⁹³ Or perhaps the wisdom of a motion picture trust was not lost on the current generation of studio heads, so they used the Production Code and the Hays Office as a sanctioned method of maintaining the cartel-like operations of the studio system.⁴⁹⁴

Whatever the motivation, the decisions were repeated. In the late 1940s, the threat of Communism was rapidly cooling the relations the United States had with the Soviet Union. Allies no more, Communism was now viewed as a significant threat to the United States.⁴⁹⁵ When the Hollywood Communists⁴⁹⁶ (many of them from the next wave of Jewish immigration) became the focus of public pressure and governmental concern, the members of the Hays Office successor, the MPAA, again chose to cooperate with the legal and voluntary censorship systems despite the ultimate cost such collaboration would have.⁴⁹⁷

To protect the reputation of Hollywood, admitted Communists were no longer allowed to work; political speech resulted in a lifetime bar to employment. Hollywood and the studios that actively collaborated with the House Un-American Activities Committee bear much of the blame for their participation and capitulation. But so do the courts. Again the legacy of limited First Amendment protection came to haunt the nation. Only through an absolute First Amendment

493. See GABLER, *supra* note 465, at 277-328.

494. *Id.* at 47-50.

495. See Blasi, *supra* note 428, at 464-65.

496. See GABLER, *supra* note 465, at 356 ("With its commingling of Communists and Jews, Hollywood was obviously an ideal quarry . . .").

497. See Erica Bose, Comment, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 UCLA ENT. L. REV. 321, 324 (1999). Bose reports:

The [House Un-American Activities Committee] hearings began on Oct. 13, 1947, with the friendly witnesses. During these first five days such individuals as producers Jack L. Warner and Louis B. Mayer, and novelist Ayn Rand testified against the evils of communism and those individuals in Hollywood trying to insert subversive communist ideas into motion pictures.

Id.; see also Paul R. Joseph, *Pleasantville: An Essay on Law, Power, and Transcendence in Our Cultural Mythological Past*, 24 NOVA L. REV. 621, 635-38 (2000) (discussing the politics of *Pleasantville* and its represented era as the community versus the other); David Lempert, *The "Jewish Question" in Russia and the Rewriting of History*, 22 LEGAL STUD. F. 457, 465 (1998) (looking at twentieth-century historical events in Russia through the eyes of the Jewish people).

protection of political speech could the activities of Congress have been stopped without the witch-hunts and show trials.

For the public, two important imprints were left by the Hays Office legacy. The first deals with voluntary censorship. The notion that voluntary censorship is a benign, unintrusive model designed to promote positive values without sacrificing free expression or democratic values has been sold to us since 1922. In addition to motion pictures, the media has added voluntary ratings to television, music, and video games, often at the urging of Congress. Despite the illustrative experience of many works like Shaw's *St. Joan*, unpopular works (with the censors) continue to be banned and blocked.

The illusion of a permissive, voluntary system is further strained by the discordant statements of the MPAA and the exhibitors. Jack Valenti, current MPAA president, explains the voluntary nature of the rating system this way: "If parents don't care, or if they are languid in guiding their children's moviegoing, the rating system becomes useless. Indeed, if you are 18 or over, or if you have no children, the rating system has no meaning for you. Ratings are meant for parents, no one else."⁴⁹⁸ Following this explanation, it would appear any person can attend any movie, subject only to parental control and personal taste. Only the system does not quite work this way.

Following the massacre of high school students in Littleton, Colorado in 1999, President Clinton pressured the National Association of Theater Owners to enforce the so-called voluntary movie-ratings restrictions by requiring photographic identification.⁴⁹⁹ Under the policy now enforced by the vast majority of theater exhibitors, Valenti's statement becomes a false promise. Parents who wish to encourage their teenage children to attend appropriate but mature films must accompany them to the theater. While still technically voluntary, the system urged by the President seems much like the governmental ban on alcohol and tobacco from which it is modeled.

The second legacy of the Hays Office was to weaken the impact of state-sponsored censorship. The fence within the fence of the Hays Office effectively marginalized the state and local film boards. Their threat kept the Hays Office humming, but only so no film board could have an opportunity to complain about the content of a Hollywood

498. Jack Valenti, *How It All Began*, available at <http://www.mpa.org/movieratings/about/content3.htm> (last visited Oct. 19, 2001).

499. Jesse Hamlin, *Theaters to Check IDs for 'R' Films: Voluntary Effort to Limit Violence Seen by Kids*, S.F. CHRON., June 9, 1999, at A1.

film. The effect was to desensitize the public and the courts to the real censorship taking place. Perhaps if the Supreme Court had hundreds of petitions to grant certiorari in cases like *St. Joan*, it would have realized that allowing a system of prior restraint for motion pictures was fundamentally inconsistent with First Amendment principles of the eighteenth or nineteenth century.

Because a film takes weeks or months to be produced and edited, the risk of it resulting in an overt act that could meet even the "imminent lawless action" test seems absurd. Given the minimal risk that a motion picture could ever be dangerous, as opposed to immoral or obscene, the need to protect the public with prior restraint was far less than that in evidence in *Near v. Minnesota* in which the paper was tried for its past activities. Nonetheless, the few obscure cases that went to the obscenity review boards or to the courts gave little suggestion that a large-scale regime had developed to interfere with the production of films at every stage of their development.

V. THE MEDIA AND THE MODERN FIRST AMENDMENT

Despite the rampant censorship of the Hays Office, the participation by the studio executives in the House Un-American Activities Committee hearings, and the First Amendment protection now available under *Burstyn*, the Production Code survived. Finally, in 1968, the MPAA eliminated the Production Code by replacing it with the modern Code and Rating Administration (CARA).⁵⁰⁰

The rating system eliminated the formal code, replacing it with a review board that designates the age appropriateness of each film or advertising trailer by providing a letter code for each audience group.⁵⁰¹

500. See MAST, *supra* note 252, at 430.

501. VOLUNTARY MOVIE RATING SYSTEM, available at <http://www.mpa.org/movieratings/content.htm> (last visited Oct. 19, 2001). The current rating guidelines are as follows:

Voluntary Movie Rating System

G	General Audiences	All ages admitted
PG	Parental Guidance Suggested	Some material may not be suitable for children
PG-13	Parents Strongly Cautioned	Some material may be inappropriate for children under 13.
R	Restricted	Under 17 requires accompanying parent or adult guardian.
NC-17	No One 17 and Under Admitted	

The X rating was changed to the trademarked NC-17 rating in 1990, along with the addition of the PG-13 rating. The PG-13 change was designed to clarify the difference between teen

Despite the advisory nature of the ratings, the standards were generally the same as the Production Code, with an emphasis on minimizing brutality, respecting religion, and upholding the dignity of human life.⁵⁰² The new ratings were so popular that jurisdictions tried to incorporate them directly into local law.⁵⁰³

Also, like its predecessor, CARA has the de facto effect of comprehensive censorship. No television advertisements can take place for a motion picture that is not rated by the MPAA, and many newspaper chains refuse to carry the print advertisements. Because everything is "voluntary" and the advertising outlets (primarily television and newspapers) have their own First Amendment rights regarding the advertisements they choose to run, little can be done to provide alternatives to the rating system. The system is further reinforced because most film productions are distributed by members of the MPAA, and those companies generally require a rating of the film as part of the filmmaker's delivery requirements.⁵⁰⁴ In other words, an independent filmmaker can get her movie financed by a distributor but only by agreeing to deliver a film of the appropriate rating, typically PG-13 or R. The film must be edited until the standard is met or the filmmaker can neither get paid nor get the film distributed.⁵⁰⁵ Structured in this fashion, the movie industry cannot readily move away from the MPAA rating guidelines.

A. *The Current Technologies: Cable, Wireless, and Beyond*

Nor is there any movement to leave voluntary ratings. Instead, the television industry has adopted the model as its own.⁵⁰⁶ Like the MPAA, the television industry has implemented a standardized set of ratings, adopted a ratings board to review and to designate programs,

and preteen movies. The NC-17 designation was designed to give the MPAA control over the adult film category. The X rating had been ceded in the marketplace to the pornography industry.

502. See Shoshana D. Samole, *Rock & Roll Control: Censoring Music Lyrics in the '90s*, 13 U. MIAMI ENT. & SPORTS L. REV. 175, 186 n.77 (1995) (quoting EDWARD DEGRAZIA & ROGER K. NEWMAN, *BANNED FILMS: MOVIES, CENSORS, & THE FIRST AMENDMENT* 120 (1982)).

503. See *Motion Picture Ass'n v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (finding a law that criminalized the misuse of the MPAA ratings unconstitutionally vague); see Samole, *supra* note 502, at 186.

504. See JOHN W. CONES, *THE FEATURE FILM DISTRIBUTION DEAL* 88 (1997).

505. *Id.*

506. See THE TV PARENTAL GUIDELINES, available at <http://www.tvguidelines.org/default.htm> (last visited Oct. 19, 2001).

and voluntarily set standards for uniform compliance.⁵⁰⁷ Also like the MPAA ratings, the television ratings replace a much sterner Production Code that each of the networks used to review the script of every episode being produced to assure it met the appropriate standards of morality, decency, and language.

The modern television ratings approximate those of the motion picture during the days of the Hays Office for another important reason as well. One consequence of the slow development of the First Amendment in the entertainment arena is the continuing range of content regulation in broadcast media such as radio,⁵⁰⁸ television,⁵⁰⁹ and cable,⁵¹⁰ and all media in which children may be exposed to the content.⁵¹¹

In *Red Lion Broadcasting Co. v. FCC*, the Court explained that this content regulation was based in part on the theory that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."⁵¹² The Court gave Congress wide latitude to treat each broadcaster "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."⁵¹³

507. *Id.*

508. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210-214 (1943).

509. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (upholding the fairness doctrine that required broadcasters to provide free air time for opposing candidates to rebut endorsements or personal attacks).

510. *See generally* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding the "must carry" provisions that require cable system operators to provide bandwidth or channel availability to local broadcasters). *But see* *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (striking down requirement that channels primarily dedicated to sexually oriented programming eliminate all signal bleed as a form of content regulation because it was limited to adult-oriented programming only).

511. Motion pictures may still be subject to some censorship because standards can be constitutionally different for minors than adults. The Court in *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), explains:

The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

See also *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); *Pacifica Found.*, 438 U.S. at 749-50; *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968).

512. *Red Lion*, 395 U.S. at 390.

513. *Id.* at 389.

The Court was concerned that the audience be protected from the potential monopoly that such limited broadcast media might have: "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁵¹⁴

Rather than treating the free speech interests of the broadcaster as paramount, the Court has allowed Congress to identify a variety of objectives, such as: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁵¹⁵

The result is that television has adopted a "voluntary" rating system against a backdrop of federal regulatory approval, governmental license renewals, and systematic content review. Again, the voluntary fence has been carefully built around the regulatory fence.⁵¹⁶ Because these fences do not apply to the Internet,⁵¹⁷ however, the next test for free speech and censorship will come when the unregulated world begins to challenge the voluntarily monitored media.

A classic example of these illusory free speech rights is embodied in the rhetoric of the Court in *FCC v. League of Women Voters*.⁵¹⁸ There, the Court struck down a governmental ban of editorial content generated by public television stations that receive federal funds.⁵¹⁹ The decision went to great lengths to stress the importance of editorial discretion and the need to speak regarding issues of public concern.⁵²⁰ Repeatedly, it stressed that "the expression of editorial opinion . . . is entitled to the most exacting degree of First Amendment protection."⁵²¹

Yet despite the rhetoric of a Court deeply concerned with the ability of a local public broadcaster to express editorial opinion, the

514. *Id.* at 390.

515. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994), *aff'd*, 520 U.S. 180 (1997).

516. Nor does any of this regulation stop networks from airing *Temptation Island* on Fox or *Real Sex* on HBO.

517. *See Reno v. ACLU*, 521 U.S. 844, 867 (1997).

518. 468 U.S. 364 (1984).

519. *See id.* at 402.

520. *See id.* at 392-93.

521. *Id.* at 375-76.

real impact of the case is to reaffirm how much power Congress can wield over the public broadcast stations:

Congress may, in the exercise of this power, seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.⁵²²

Justice Stevens, in dissent, suggested that the law should be upheld because, given the pernicious power of the government to coerce editorials favorable to the government through the funding, licensing, and other regulatory controls a ban is favorable to the false suggestion of independence.⁵²³ Philosophically, this may be true, but it damns the entire First Amendment to suggest it cannot be upheld in part.

Nonetheless, most of Steven's concerns remain valid. The majority reserved as the domain of the First Amendment only the shallowest of rights, the power to editorialize.⁵²⁴ The same section of the law barred the endorsement of political candidates, and the same editorial process can result in a loss of license if the governmental regulator determines that the editorial content is not fairly balanced.⁵²⁵

Ultimately, balance itself should be questioned rather than being accepted as a valuable goal worthy of diluting First Amendment protection. Does the public get an improved marketplace of ideas if both good and bad ideas are forced into the square as equals? To illustrate with an extreme example, television and newspapers hardly provide a *balanced* picture of witchcraft or Communism because the public has determined that these are immoral positions that cannot be defended. The First Amendment protects the speakers who espouse

522. *Id.* at 377.

523. Justice Stevens opined:

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolf Hitler over Radio Berlin to appreciate the importance of that concern.

Id. at 408-09 (Stevens, J., dissenting).

524. *See id.* at 370 n.7.

525. *Id.* at 402.

these unpopular ideas, but it should not then be transformed into a vehicle to promote them. The same is true for moderate beliefs. It should not require so-called balance to present calls to end hunger, illiteracy, or whatever social ill the station chooses. When all the balancing is done, an absolute ban on government interference would produce fewer harms, fewer governmental entanglements, and fewer lawsuits. When it comes to Congress making laws abridging the freedom of speech, less is more.

The First Amendment has had to take on meanings never intended by the founding fathers as technology forces forms of speech never before thought imaginable. Both Congress and the courts have struggled to maintain a balance between the ideals of the First Amendment and the political reality facing the nation.

In upholding new laws adopted by Congress, the courts concluded that Congress had made "reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable industry."⁵²⁶ Diversity and competition in the cable industry is a laudatory goal. Just as the competitors to the Motion Picture Patents Company successfully showed that that company had illegally monopolized the early motion picture industry, the government and the other cable operators should use antitrust laws and other vehicles to protect a competitive market.⁵²⁷ Instead, however, Congress and the FCC have acted to protect their idealized concept of a diverse marketplace through regulation and licensing.

The regulations set capacity limits on audience reach, something no law would be allowed for a newspaper or motion picture.⁵²⁸ Implicit in this regulation is an assumption that the stations carried by the cable operators are generally the same, so channels like Nickelodeon, HBO, or Bravo could still have 100% market saturation as every cable operator selected to carry that channel. This assumption may very be accurate, and indeed, the direct result of the regulatory structure. The diversity so cherished by Congress has created a homogenization of content.

526. *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1319-20 (D.C. Cir. 2000).

527. *See Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917); *accord United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (finding vertical and horizontal monopolies among the motion picture studios).

528. *See* 47 C.F.R. § 76.503 (2000).

Another of the interests Congress has attempted to promote is "localism": Content originating from each local community "to ensure that 'all communities of appreciable size' have their own voices 'as an outlet for local self-expression.'"⁵²⁹ Viewers of television can judge independently whether this approach has been successful, but most programming today comes from networks or national syndicators rather than local stations. These relationships are promoted through FCC policy to help build audiences for local programming.⁵³⁰ The net effect of these promotional goals is an increasingly regulated marketplace where only the most powerful of content providers can compete.

Whether the market would be similarly dominated without regulation is unclear, but the regulation has not fostered meaningful diversity of content nor promotion of local content. Further, because all the networks but NBC are owned by the same companies that make up the Motion Picture Producers and Distributors of America and its successor, the MPAA, the diversity of voices has not changed much since Edison's Trust was busted in 1917 and the new oligopoly was formed. Given nearly a century of the same voices, perhaps it is time that Congress recognize that the damage being done to the First Amendment is not outweighed by the tangential impact it has on the entertainment marketplace.

The need to deregulate the television marketplace may be further suggested by the move to adopt voluntary ratings. As with the motion picture industry during the days of the Hays Office, the ratings are designed to blunt the governmental intrusion into content decisions. Without the government as a perceived threat, the only purpose of the ratings would be to serve the audience. If localism was dropped as a goal at the same time, then perhaps additional programming opportunities would be opened up for smaller niche programs that would be unable to attract a sufficiently large audience on the local

529. Baoding Hsieh Fan, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 FED. COMM. L.J. 619, 635 (2000) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-74 (1968)).

530. Professor Baoding Hsieh Fan explains:

[T]he FCC has structured its regulations in order to promote strong network/affiliate relationships. The broadcast networks—ABC, CBS, NBC, and FOX—have partnered with affiliated television stations in markets across the country to offer a unique mix of national programming produced by the networks, local programming produced by the stations, and syndicated programs acquired by stations from third parties.

Id. at 635-36.

level, but might be successful on the national level. For example, Spanish language television is available as local programming in some markets, but local stations featuring reruns may supplant the choice for a cable operator to carry such a station in other markets. By contrast, children's television through cable stations like Disney and Nickelodeon have improved children's broadcasting in recent years because they deliver niche programs to a national audience.⁵³¹

Alternatively, if the governmental regulations are truly necessary, then the content restrictions should become an open, public process. It should require due process and appellate procedures just as the Supreme Court has required when upholding film censorship ordinances, namely that the government have the burden, that any prior restraint be imposed only briefly to allow for judicial review, and that a prompt judicial determination be available.⁵³² The goal is not to advocate the end of parental advisory labels that help the viewer make informed decisions. The goal is to remove one of the two censorship fences surrounding the content. While I believe it is the viewer rather than the government who should select what is appropriate and inappropriate to watch, a governmental system that bans the most offensive of speech is not inconsistent with the First Amendment jurisprudence applied over the last century.

When the self-censorship is designed to protect against a slow, costly governmental censorship, however, the choices made are necessarily going to be unduly conservative. The safe path is to avoid the censor's process entirely. If the safeguards are not in place for an efficient hearing and timely determination, the very triggering of the censorship process is tantamount to losing that hearing. Television, with its congressional goals of localism and diversity, a process of

531. Other such channels presently include *HGTV* for home and garden, *Bravo* for arts, the *Discovery Channel* for educational science, etc. Cable has allowed these channels to develop without the need for local broadcast affiliates, but these niche programmers may have developed as affiliated national networks had Congress not thought that localism was preferred.

532. See *Freedman v. Maryland*, 380 U.S. 51, 61-62 (1965) (Douglas, J., concurring). Justice Douglas stated:

The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul of the First Amendment:

- (1) the censor must have the burden of instituting judicial proceedings;
- (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and
- (3) a prompt judicial determination of obscenity must be assured.

Id.; see also *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (remanding the case for want of "narrowly drawn, reasonable and definite standard for officials to follow").

ongoing license renewal, and the ability of the FCC to bring regulatory actions against broadcasters,⁵³³ creates the greatest threat of implied censorship controls. This, unfortunately, is one of the chief outgrowths of the Hays Office.

Technology may still change this. As part of the overhaul of the Telecommunications Act in 1996, Congress ordered television manufacturers to begin installing the V-Chip, a customizable screening device intended to give viewers, and particularly parents, control over the actual broadcasts that can be viewed on each particular television set.⁵³⁴ The goal is to provide parents with a mechanism that will allow them to program the voluntary parental advisory categories into the television in order to block access to offensive programs from coming into the home. While this will protect all viewers from unwanted exposure to materials those individuals feel is offensive, the primary goal is to provide parents control over the content viewed by their children when the parents are not present.⁵³⁵

Whether or not the V-Chip itself proves successful, the technology is rapidly developing for some type of efficient filtering system. With the ability to control the unwanted content coming into the home, many of the traditional reasons for regulating television differently from other forms of media begin to erode. At such a time, perhaps, the voluntary rating systems will truly be voluntary. The threat of repercussions will no longer stop a broadcaster from creating content that is unpopular, nor advertisers from selling space to promote those shows.

B. Regulating the Piano Roll

One need only look at the Internet for an example of what happens when the market controls its own content rather than looking towards the government. Admittedly, the Internet has a fundamentally different media structure. Today, the costs of distributing content are

533. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 731-32 (1978) (upholding restrictions on indecent speech in the broadcast medium); *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995); Letter to Mel Karmazin, President, Infinity Broad. Corp., 9 F.C.C.R. 1746 (1994) (describing how the "Howard Stern Show" received Notice of Apparent Liability in the amount of \$400,000 for indecent speech).

534. See Telecommunications Act of 1996, 47 U.S.C. § 251 (Supp. V 1999); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1695 (1997).

535. Cf. *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660, 10,699 (1996) (strengthening the FCC's enforcement of the Children's Television Act of 1990).

much lower, the audience is less heavily aggregated towards any particular site, and the quality is marginal for most of the audience because of limitations on the speed of content distribution. The legal structure is different because the courts have stopped Congress from establishing a regulatory system on content distributors.⁵³⁶

As a result of these legal and technological differences, the content on the Internet is fundamentally different from that on television or radio. While traditional media like film are represented, the content is significantly more diverse and eclectic.⁵³⁷ The Court's protection of the First Amendment over the government's perceived interest in protecting society has not seemed to have had devastating societal consequences. Whether a long-term erosion of morality or civility will ensue cannot be adequately gauged. Like the world Eastman and Edison created after the phonograph, instant photography, radio and motion pictures, the next century's entertainment will be different and it will impact society. Whether the impact will be for our benefit cannot be known in advance and probably will never be fully agreed upon by historians.

The First Amendment is only one of the regulatory tools at stake. Copyright is equally potent for shaping the new technologies. Like the laws and court opinions surrounding the piano rolls in the first decade of the last century, the government is trying to put laws in place without the ability to know what the future will hold. Today, radio and audio broadcasting are very prevalent on the Internet because current technology allows for acceptable performance levels. Copyright laws are again creating a confusing mess of technical regulations. In 1995, Congress granted the recording industry the right to control the public performances of a sound recording when used in some instances in a digital format.⁵³⁸ These provisions were amended in 1998 with the Digital Millennium Copyright Act.⁵³⁹ Through strained statutory reconstruction, these new provisions were adapted to protect the record industry from Internet webcasters in much the same way the 1909 Act was designed to protect the music publisher from the piano roll

536. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997).

537. Paul Talacko, *Web Gets a Slice of Lights, Camera, Action*, FIN. TIMES (London), Dec. 23, 1999, at 8.

538. Digital Performance Right in Sound Recordings Act of 1995 (DPRSA), Pub. L. No. 104-39, 109 Stat. 336, 336-49 (codified at 17 U.S.C. § 106(6) (2000)).

539. Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830, 2830-34.

manufacturers (the record companies' predecessors).⁵⁴⁰ The early cases are only now making their way through the courts, and the meaning of the oft-modified statutory provisions are only beginning to take shape.⁵⁴¹

Whichever are the choices to be made by Congress and which by the courts, the path has been shown before. The new technology will undoubtedly create entirely new economic opportunities for the music and recordings. At first, as with the piano roll and record companies, they will try to avoid paying any fees for their services. Eventually, as the income grows, it will become strategically appropriate to share the revenue with the musicians, music publishers, and others involved in the creative process. Napster, the peer-to-peer music sharing system and website, has recently reinvigorated this model. During its first phase, it boldly encouraged musical computer files be swapped among the public without regard to copyright ownership.⁵⁴² Having been enjoined from copyright violations, it now seeks to accommodate the copyright holder.⁵⁴³

Even these steps are transitional. No one has yet to record music for the Internet. Today, the music industry remains where it was when piano rolls were being recast onto 78 rpm records and sold in cardboard albums. When a musical format is marketed successfully without the participation of the present-day recording company, then the model will necessarily change. For better or worse, the rights negotiated will be those based on the laws now being adapted to the recording industry's involvement in the Internet.

The same transition will be true for motion pictures and new forms of entertainment made possible through the changing technologies.⁵⁴⁴ The current copyright laws will continue to be reformed as necessary to stay only one or two steps behind technology and business practices. The economic model of the entertainment

540. See 17 U.S.C. § 114 (2000); see David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 191-92 (2000).

541. *E.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000); *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000).

542. See *A&M Records*, 239 F.3d. at 1011.

543. David Streitfeld, *Napster Will End Trades of Some Music Files: Site Acts in Anticipation of Coming Court Order*, WASH. POST, Mar. 03, 2001, at E1.

544. *E.g.*, *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (barring de-encryption of protective codes on DVD disks).

industry, however, will remain paramount. As these industries grow, the economic interests continue to expand. As those interests expand, the desire to protect them grows concomitantly. If the courts eventually determine that the Constitution requires some limited time for copyrights to run,⁵⁴⁵ then Congress will probably enact some form of historical preservation legislation to protect those works over a century old from being mistreated in the public domain. These valuable assets will not be wasted.

C. *Privacy's New Clothes*

The demand for privacy protection has peaked once again, just as it did a century ago when new communications technologies threatened to invade the home. Today, the focus of the danger is the ability to collect and to correlate personal data. While the town grocery clerk could always know something of a person's shopping habits, that information was not terribly valuable to the clerk and the anonymity of most larger stores meant that the information could do no harm. Nineteenth-century urbanization created the phenomena of privacy because the details of one's daily life were dispersed among thousands of people. Warren and Brandeis focused primarily on one particular intrusion into this seclusion, the exploitation of one's personal life in the public eye. Using Prosser's categories, this would include both the right of publicity and the right to avoid the public disclosure of private facts.⁵⁴⁶

These concerns again grip the nation.⁵⁴⁷ New technology used on the Internet, in grocery stores, and by financial services companies undoes the protection of anonymity. Instead of the grocery store clerk remembering, that data is scanned into a database from the checkout counter, correlated with credit and debit card information, and at least

545. See *Eldred v. Reno*, 239 F.3d 372, 374-80 (D.C. Cir. 2001), *cert. granted sub. nom. Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002) (upholding constitutionality of copyright term extension, by stating that "limited times" was not a substantive limitation on Congress' power to legislate).

546. See Prosser, *supra* note 75, at 389. Prosser describes the categories as "[p]ublic disclosure of embarrassing private facts about the plaintiff" and "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

547. See Federal Trade Commission, *Privacy Online: A Report to Congress* (June 1998), available at <http://www.ftc.gov/reports/privacy3/toc.htm> (last visited Oct. 20, 2001) (reviewing manner of collecting data and impact on consumer confidence); see also Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315 (2000) (focusing on comparative international treatment for data privacy); Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751 (1999) (book review) (same).

potentially, tracked against the activities of the person when visiting Web sites on-line.⁵⁴⁸ Just as the commercial forces shaped the development of privacy law, the commercial interests are again shaping the law.

This is best illustrated in the range of statutes and regulations that Congress has already adopted regarding online or Internet privacy. In addition to protections that predate the Internet under the Fair Credit Reporting Act⁵⁴⁹ and student privacy,⁵⁵⁰ Congress has adopted privacy measures in new regulations for financial services⁵⁵¹ and health care.⁵⁵² Congress has also provided general privacy laws regulated by the Federal Trade Commission for protection of children under thirteen.⁵⁵³

In each of these disparate areas of the law, Congress and the federal regulatory agencies are extending rules on data security and privacy. As industry learns to comply with the rules for a particular sector, it develops the capability and facility for compliance in other areas as well. Conversely, the areas where protection is gaining momentum are those areas where Prosser's "public disclosure of private facts" is at issue rather than the publication torts emphasized by Warren and Brandeis.

Again, the entertainment effect is at work. In those areas where there is a public consensus that any publication is an intrusion, Congress or federal regulators can confidently develop standards that approximate the public's interest in being left alone. Where, however,

548. Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 357, 375 & n.85 (2000) (describing the storm of protest regarding DoubleClick's purchase of Abacus and the decision to combine the databases of on-line and credit card consumer information).

549. See Consumer Credit Protection Act, 15 U.S.C. §§ 1681-1681t (2000) (restricting reporting of consumer credit).

550. See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2000).

551. See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 501-527, 113 Stat. 1338, 1436-50 (1999) (codified at 15 U.S.C. §§ 6801-6827 (2000)).

552. See Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, §§ 701-702, 110 Stat. 1936, 1939-46 (codified at 29 U.S.C. §§ 1181-1182 (Supp. V 1999)); see also U.S. Dep't of Health & Human Servs., Standards for Electronic Transaction, Final Rule, 65 Fed. Reg. 50,312-72 (codified at 45 C.F.R. pts. 160 & 162 (2001)) (privacy regulations adopted by the Secretary of Health and Human Services); Basic HHS Policy for Protection of Human Research Subjects, 45 C.F.R. pt. 46 (2001) (biomedical research).

553. See Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-728 to 2681-735 (codified at 15 U.S.C. §§ 6501-6506 (2000)) (requiring verifiable parental consent for data collection); FTC Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,901-02 (1999) (codified at 16 C.F.R. pt. 312 (2001)).

the privacy interest focuses on publication torts, the publisher's First Amendment concerns reappear, and the economic interests of the publisher must be more adequately balanced against the privacy interest. A general example will illustrate the point: when health information is used to terminate an employee, such a termination is generally considered immoral. That same information when used to ensure that the congregants of a church send get well cards is laudatory, if not morally required. Similarly, because no parents want anyone to contact their small children without the parents approving in advance, Congress had no problems rallying the public to support privacy protection for children. Because children under thirteen generally do not have access to credit cards, the business community saw far less risk in the law than the risk of public reaction had they opposed the protections.

The health care standards go further than most of the other federal regulations. These require that not only the health care provider, but every company in the chain of custody of the protected private data, be subject to the regulations.⁵⁵⁴ These companies must also agree to work with the health care provider to implement internal and external privacy and security measures.⁵⁵⁵ As such, these regulations will percolate through many areas of Internet commerce, including software developers, data storage facilities, Internet service providers, and other intermediaries, creating a culture of data protection.

For example, once a company is obligated to identify a privacy officer for one aspect of its business, it may prove difficult not to let that privacy officer be responsible for all data matters. Similarly, security clearances for access to sensitive data will generally not be segregable into health care information and other proprietary information. The net effect will be to expand the framework for privacy and security selected by the federal regulators.

Publicity rights still fit nicely into any privacy regime. Unique among privacy rights, publicity rights require the permission of the identified person as a condition of the information's publication. For many Internet activities, treating information provided to a website company as limited by publicity rights would simply mean that the privacy policy would need to detail explicitly the purpose for which the information was being collected and to whom the information was

554. 45 C.F.R. § 164.530 (2001).

555. *Id.*

being published. Of course, a general release could also be sought, but the sellers of publicity rights have learned that more limited releases are far more appropriate in virtually every situation.

Only when the framework selected by the federal agencies collides with the First Amendment do these rights come into conflict, and this conflict is not new. Publicity rights and First Amendment rights have been contrasted by the courts for fifty years.⁵⁵⁶ Perhaps, rather than creating novel difficulties, these cases might provide some guidance or at least a starting point for courts dealing with these potential conflicts. Whether or not this model is adopted, entertainment law's impact has been felt. The growth of privacy has inevitably been caused by the development of technology capable of destroying it, technologies that generally serve as part of the entertainment landscape.

VI. CONCLUSION: THE NEW ENTERTAINMENT WORLD

This Article began as an exploration of the impact of entertainment law and practice on three of the many legal doctrines that entertainment lawyers regularly use. Privacy (including Publicity), Copyright, and First Amendment law are all key components of the regular work in an entertainment lawyer's office as a typical play, film, television pilot, or CD is being developed. Occasionally, two or three of these worlds intersect as publicity rights and copyrights are tested against the rights of free speech.⁵⁵⁷

Perhaps the ultimate lesson was provided by Hugo Zacchini, the human cannonball. In his complaint against the local television station, he merely wished to be paid for its broadcast of his life's work, his fifteen seconds of air travel from the mouth of the cannon. The television station claimed First Amendment rights to air what it desired, but the rights to Mr. Zacchini's livelihood were at stake. No one knew for certain what damage would be done to the professional career of Mr. Zacchini, but undoubtedly if there was a such a threat it was Mr. Zacchini's alone to risk, not the station. The property rights were that of Mr. Zacchini—author and performer in his life story.

556. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment can itself be important news."); *Stephano v. News Group Publ'ns., Inc.*, 474 N.E.2d 580, 583-84 (N.Y. 1984).

557. See, e.g., *N.Y. Magazine v. Metro Transit Auth.*, 987 F. Supp. 254, 257 (S.D.N.Y. 1997) (denying relief to Mayor Rudolph Giuliani for a New York Magazine bus advertisement that said the magazine was "[p]ossibly the only good thing in New York Rudy hasn't taken credit for").

Whether he was a human cannonball or the next Shakespeare, the property rights were economic interests entertainment law had endeavored to protect.

In each of the three areas discussed, change wrought by technology led to new entertainment, which in turn led to new conceptualizations of the general law. Without the new technologies invented in the nineteenth century, electricity, light bulbs, phonographs, piano rolls, film, and movie projectors, the law could have stayed untouched because the social conventions would have changed at a more leisurely pace.

In discussing the new landscape, Warren and Brandeis correctly pointed to the new media as the culprit for a need for privacy rights. They could have said the same things about the need for new copyright protections and a renewed commitment to the fundamentals of the First Amendment.

Professor Goldstein has commented that "copyright owners suffer and consumer electronics companies benefit any time Congress postpones a decision on home copying."⁵⁵⁸ The statement may reflect a very short-term analysis of costs and benefits. Musicians ultimately reaped the rewards of the piano roll and phonograph. The tape recorder popularized in the 1960s gave rise to the inclusion of copyright protections for sound recordings in 1971.

Just as society entered the last century on the cusp of a technological revolution, we may be in the first stages of the next wave. As new technologies are developed, the same tensions will again be felt in the common law, statutory law, and constitutional law as society gropes forward to understand how to regulate the current changes without knowing the new world that is forming just over the horizon.

Although generally considered a sideshow in the legal arena, entertainment law has deeply shaped the political, legal, and economic reality that supports the development of the law. Through the traditions of governmental and self-censorship that have accompanied theatre and film throughout history, the notion that some regulation is a necessary part of the entertainment landscape has left an indelible mark on all aspects of First Amendment jurisprudence. Through its slow adoption into the exalted realm of copyright protection, mere entertainment transformed the central scope and purpose of copyright from the useful maps and productive books to the frivolous, but highly

558. See GOLDSTEIN, *supra* note 140, at 134.

lucrative world of music, plays, and films. So too in the common law itself, where notions of privacy were driven by the demand that commercial exploitation of photographs be compensated. License could not be taken, but it could be bought and sold.

Warren and Brandeis truly knew us best: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."⁵⁵⁹ The world of entertainment keeps us young at heart.

559. *Warren & Brandeis*, *supra* note 13, at 193.